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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1513

CON. F. SHEA, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES, *et al.*,

Petitioners,

v.

ASCENSION VIALPANDO, *et al.*

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinion of the United States Court of Appeals for the Tenth Circuit, reported at 475 F.2d 731, there have been two memorandum opinions issued by the United States District Court for the State of Colorado. *Vialpando v. Shea* (D. Colo. Civil Action No. C-2449, Jan. 13, 1972) (Single Appendix p. 42); *Vialpando v. Shea* (D. Colo. Civil Action No. C-2449, March 9, 1972) (Single Appendix p. 78). Neither District Court opinion is published in Federal Supplement.

QUESTION PRESENTED

Whether, consistent with the requirement of §402(a)(7) of the Social Security Act that "any expenses reasonably attributable to the earning" of income be taken into consideration, Colorado may, in determining financial eligibility and the amount of benefits under its AFDC program, refuse to consider those expenses which are reasonably attributable to the earning of income but in excess of a flat $30 monthly allowance, as permitted by Colorado Welfare Manual §4313.13.

STATEMENT OF CASE

Pursuant to the Social Security Act of 1935, 42 U.S.C. §301 *et seq.*, the State of Colorado cooperates with the federal government in providing welfare assistance to needy persons under Colorado's "state plan" consisting of state statutes and regulations. One of the federally-aided public assistance programs is Aid to Families with Dependent Children (AFDC) which is contained in Title IV of the Social Security Act, 42 U.S.C. §§601-610. The declared purpose of the AFDC program is to provide financial aid to needy children and their parents or relatives with whom they are living, to help strengthen family life, and to help such parents or relatives obtain capacity for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. 42 U.S.C. §601.

Although the states are not required to participate in the AFDC program, those that do must comply with the requirements of the Social Security Act. In return for approximately $24,000,000 yearly which it receives from

the United States government,[1] Colorado must provide AFDC grants to all eligible individuals consistent with the various conditions set forth by Congress. See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *Lewis v. Martin*, 397 U.S. 552 (1970); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Townsend v. Swank*, 404 U.S. 282 (1971); *Remillard v. Carleson*, 406 U.S. 598 (1972). This case arises out of the failure of Petitioners (hereinafter also referred to as Welfare Department or State) to abide by the clear command of one of those conditions; to wit, §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7).

The case involves working individuals who, because of the inadequacy of their earnings, are in need of supplemental public assistance benefits under the AFDC program. Section 402(a)(7) requires each state, in determining financial eligibility for and the amount of an AFDC grant, to take into consideration any income and resources of such individuals "as well as any expenses reasonably attributable to the earning of such income." 42 U.S.C. §602(a)(7).[2] In general, if the net available

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[1] Colorado received $23,580,000 from the federal government for its AFDC public assistance program in the fiscal year ending June 30, 1970. NCSS Report F-2 (FY 1970), "Sources of Funds Expended for Public Assistance Payments and for the Cost of Administration, Services and Training," Table 7, Published by The Department of Health, Education and Welfare.

[2] This quoted language is contained in and is applicable to *all* categorical assistance programs under the Social Security Act: Old Age Assistance (OAA), §2(a)(10), 42 U.S.C. §302(a)(10); AFDC §402(a)(7), 42 U.S.C. §602(a)(7); Aid to the Blind (AB), §1002(a)(8), 42 U.S.C. §1202(a)(8); Aid to the Permanently and Totally Disabled (APTD), §1402(a)(8), 42 U.S.C. §1352(a)(8); Aid to the Aged, Blind and Disabled (AABD), §1602(a)(14), 42 U.S.C. §1382(a)(14). Effective January 1, 1974, except in the cases of the Virgin Island, Puerto Rico and Guam, these "adult" public assistance programs have been replaced by a federally

income so derived is less than the state's standard of need, the individual is entitled to an assistance grant which acts as a supplement to his or her earnings.[3] Working applicants for and recipients of AFDC are being denied full benefit of this supplement because the State of Colorado fails to fully take into consideration, as is its obligation, those reasonable expenses attributable to the earning of income other than mandatory payroll deductions and child care expenses which are in excess of a flat $30 work expense allowance. Colorado Division of Public Welfare Manual. §4313.13.

It is important to note that this case does *not* involve a claim for work expenses that are *un*reasonable either in amount or by virtue of a tenuous relationship to employment. *Cf: County of Alameda v. California W.R.O.*, 97 Cal. Rptr. 384, 5 Cal.3d 730, 488 P.2d 953 (1971), *appeal dismissed*, 405 U.S. 913 (1972). Thus, Petitioners are not prevented from inquiring into whether a particular work expense is excessive in amount or not really attributable to the earning of income. Indeed, Respondents acknowledge Petitioners' responsibility to inquire into and consider only reasonable expenses, including, if applicable, less expensive alternative means of transportation. Petitioners, however, by operation of

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administered Supplemental Security Income Program under a new Title XVI of the Social Security Act. Pub. L. 92-603, §301. With regard to blind persons in that new program, however, Congress has reenacted the mandatory work expense provision in identical language. See §1612(b)(4)(a)(ii) of the Social Security Act, as amended by Pub. L. 92-603, §301.

[3] New applicants are similarly kept off the AFDC rolls because of assumed net income in excess of the standard of need. A detailed explanation of the actual computations in which the work expense disregard is applicable is contained in Appendix A.

their $30 flat allowance, automatically fail to recognize those work expenses in excess of $30 that *are* reasonable both in amount and attribution to employment, amounts and items of expenses which Petitioners themselves, prior to implementatoin of the challenged rule, Colorado Division of Public Welfare Manual, §4313.13, determined to be reasonable. Indeed, Petitioners acknowledge that there are working AFDC applicants and recipients in Colorado whose reasonable work-related expenses in excess of $30 per month would be recognized at this time but for the operation of the rule in question.

Such is the situation of Respondent, Mrs. Ascension Vialpando. Prior to July 1, 1970, Mrs. Vialpando was employed and receiving a supplemental AFDC grant of $74 per month for herself and her daughter, Sabrina. Her grant was computed on the basis of reasonable monthly work expenses of $126.11, an amount determined by Petitioners themselves to be reasonably attributable to the earning of income after inquiring into Mrs. Vialpando's situation. Work expenses included a monthly car payment for a used Volkswagen. This expense was allowed because of the lack of public transportation between Respondent's residence and her place of employment. Mrs. Vialpando resides in the small rural community of Fountain, Colorado, which is approximately eight (8) miles South of Fort Carson where she was employed as a kitchen helper.

Effective July 1, 1970, when Petitioners promulgated the rule at issue,[4] only $30 of the $126.11 previously

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[4]It is not, perhaps, entirely coincidental that $30 is the same amount that formerly served as a maximum for the travel expenses of working recipients. See Petition for Certiorari, pp. 6-7. Thus the amount now used to limit *all* expenses, except child care and

determined by Petitioners to be reasonable, could be deducted from Mrs. Vialpando's earned income in determining the amount of net income actually and currently available to meet her family's needs. Thus, an additional $96.11 ($126.11 less $30), though not actually available to her, was nonetheless assumed by Petitioners to be available to meet her basic family needs as determined by the state. Since, as a result, Mrs. Vialpando's assumed net earned income exceeded the state's "standard of need", cash benefits and eligibility for medical assistance under Colorado's "medicaid program" under Title XIX of the Social Security Act, 42 U.S.C. §1396a(a)(10), were terminated. See *Fullington v. Shea*, 320 F. Supp. 500 (D. Colo. 1970), aff'd per curiam, 404 U.S. 963 (1971).

Consequently, Respondent brought an action in the United States District Court for the District of Colorado seeking declaratory and injunctive relief, claiming violation of both §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7), and the Equal Protection Clause of the Fourteenth Amendment to the United States Con-

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payroll deductions, formerly limited but *one* expense, transportation.

The Colorado $30 allowance is approximately seven dollars per month below actual 1969-70 averages. (Single Appendix, pp. 40, 41, 41A-41U). Moreover, apart from being clearly below actual work expenses incurred on the average by working recipients, the $30 flat amount has not been updated since its implementation in July of 1970. In sum, the standard was not derived by a statistically fair method. Thus it cannot be accepted as accurate, even were it to be used with the proviso that an individual recipient could have expenses in excess of that amount exempted upon demonstration of entitlement.

stitution.[5] The parties submitted the statutory issue to a single judge court on cross motions for summary judgment having stipulated to the significant facts.

The matter was argued before the trial court on December 17, 1971 and an Opinion and Order was entered on January 13, 1972 (Single Appendix, p. 42); the court found that §4313.13 of the Colorado Division of Public Welfare Manual contravened §402(a)(7) of the Social Security Act and was therefore void under the Supremacy Clause. Judgment was entered on February 18, 1972 (Single Appendix, p. 50). Subsequent to the decision, Petitioners moved for a new trial on the basis of "newly discovered evidence" in the form of a Department of Health, Education and Welfare (HEW) *amicus* brief filed in another lawsuit. On March 9, 1972, the court denied Petitioners' motion and issued another memorandum opinion re-affirming its original decision. (Single Appendix, p. 78).

On March 22, 1973, the Court of Appeals for the Tenth Circuit affirmed the decision of the trial court. The court interpreted the words "any expenses" to mean "all actual expenses" and found that 42 U.S.C. §602(a)(7) required states to consider all actual expenses reasonably attributable to the earning of income in determining need. The court found the problem with the Colorado

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[5] In August, 1970, prior to the summary judgment hearing, Mrs. Vialpando terminated employment and again received a full AFDC grant. On September 1, 1971, however, she returned to work, again incurring reasonable work related expenses in excess of the $30 allowance. Thus, although Mrs. Vialpando was still eligible for a supplemental AFDC grant, her supplemental grant was significantly lower than the amount she would have been entitled to had all her reasonable work related expenses been deducted from her income as required by §402(a)(7).

system not to be its use of a standardized allowance but its intransigent adherence to this standard when a particular family's expenses of employment exceeded the allowance. The Welfare Department thereafter petitioned for certiorari and the writ was granted by this Court on November 5, 1973.

SUMMARY OF ARGUMENT

Pursuant to 42 U.S.C. §602(a)(7), Congress has mandated that states to take into consideration reasonable work expenses when determining the public assistance grants of working ADC recipients. Colorado, with the approval of HEW, has established a flat amount of $30 per month for all work expenses in excess of mandatory payroll deductions. Colorado Welfare Manual §4313.13. Respondent has reasonable work expenses greater than the $30 and submits that Colorado's $30 flat amount is in violation of the Federal Act, its legislative history, the federal regulations and cases.

The text of the statute supports Respondents. First, 42 U.S.C. §602(a)(7) requires the consideration of "any" reasonable work expenses in the determination of need; not some, not an average, but *any*. Second, the words of the statute "take into consideration" not only modify "any expenses reasonably attributable to the earning of any such income", but also modify "any other income and resources." States must consider all sources of income and all reasonable work related expenses for recipients on a case by case basis. Averaging is neither permissible for income nor expenses.

Respondent's position is reinforced by the legislative history of 42 U.S.C. §602(a)(7), added to the Social Security Act in 1962. Congress mandated states to take work expenses *fully* into account. S. Rep. No. 1589, 87th

Cong., 2nd Sess. U.S. Code Cong. & Ad. News 1943, 1959-1960.

The State and the Solicitor General argue States may take work expenses into consideration on the basis of statistical averages. The major underpinning of this averaging theory is this Court's decision in *Rosado v. Wyman*, 397 U.S. 397 (1970). Respondents respectfully submit this case can be distinguished; *Rosado* was concerned with 42 U.S.C. 602(a)(23), not 602(a)(7); *Rosado* permits states to use averaging to determine state standards of need, an area where states have traditionally had discretion, because the Social Security Act does not mandate specifically how standards of need are to be determined. However, language on work expenses is specific.

The actual controversy in this case is focused when it becomes clear that Respondent's position is even supported by federal regulations and that actually the Secretary of HEW has taken an *ad hoc* position to permit averaging of work expenses. *The Handbook of Public Assistance Administration*, Pt. IV, §3140, promulgated contemporaneously with the enactment of 42 U.S.C. §602(a)(7) permitted the establishment of a standard amount for certain items but required itemization when actual expenses exceeded the standard in the individual case. The *Handbook* is still interpretative material. Further, codification of *Handbook* rules support the disregard of all work-related expenses. The regulations start with the fundamental proposition that "only such income as is actually available for current use on a regular basis will be considered. . . ." 45 C.F.R. §233.20(a)(3)(ii)(b). This principle is then applied to work expenses: "income *equal* to expenses reasonably attributable to the earning of income" is not to be regarded as available income. 45 C.F.R.

§233.20(a)(3)(iv)(a) (emphasis added). These regulations do not permit averaging and correctly interpret the specific language of 42 U.S.C. §602(a)(7).

The *ad hoc* interpretation of the statute made only in response to lawsuits, and not in published form, is entitled to little weight given the prior administrative interpretation and Congress' failure to disturb that construction over the past twelve years. *U.S. v. Leslie Salt Co.*, 350 U.S. 383 (1956).

ARGUMENT

I.

THE WELFARE DEPARTMENT OF THE STATE OF COLORADO MUST DEDUCT ANY AND ALL REASONABLE WORK-RELATED EXPENSES IN DETERMINING THE AMOUNT OF NET INCOME ACTUALLY AND CURRENTLY AVAILABLE TO AFDC RECIPIENTS.

The clear meaning of §402(a)(7), its legislative history and the regulations promulgated thereunder all require the Welfare Department of the State of Colorado to fully deduct all reasonable work expenses in determining the need for the amount of assistance of working AFDC applicants and recipients.

A. The Clear Meaning of the Statutory Language of §402(a)(7) Requires the Full Disregard of Any and All Expenses Reasonably Attributable to the Earning of Income.

The judicial construction of a statute properly begins "by looking to the text itself." *United States v. Bass*, 404 U.S. 336, 339 (1971). Section 402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7), provides as follows:

> (a) A State plan for aid and services to needy families must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any individual (being in the same home of such child or relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

Respondent contends that the text of §402(a)(7) supports her interpretation of the section, and that the State's interpretation renders that section internally inconsistent.

Section 402(a)(7) requires the consideration of "any" reasonable work expenses in the determination of need; not some, not an average, but any. Ignoring this obvious impediment to its position, and focusing solely on the phrase "take into consideration," the State contends that the mandate of the statute may be satisfied by use of a flat amount since had Congress desired the consideration of *all* work expenses, it "could have said 'deduct all work expenses from gross income' or some other specific requirement." (Petitioners' Brief, p. 14). (See also Solicitor General's Brief, p. 6). The State's argument misses the mark, however, since the requirement that "any" expenses be disregarded is evidence, not of a lack of specificity, but of a clear intent to set *no* limitation apart from reasonableness.

If Congress intended a *different* approach to be taken words were readily available to achieve that purpose. What Petitioners seek to read into §402(a)(7) is "not so complicated nor is English speech so poor that words

were not easily available to express the idea or at least to suggest it." *Addison v. Holly Hill*, 322 U.S. 607, 618 (1944). Indeed, at the same time Congress added the work expense provision to §402(a)(7) it added the following provision to that section as well:

> "except that, in making such determination (of need), the State agency *may*, subject to limitations prescribed by the Secretary, *permit all or any portion* of the earned or other income to be set aside for future identifiable needs of a dependent child." Pub. L. 87-543, §106(b) (Emphasis added).[6]

Congress thus surely knew both how to give the states flexibility, and how to authorize a disregard of something less than 100%.[7]

More importantly, when read as a whole, the language of §402(a)(7) requires full consideration of *all* actual work expenses reasonably incurred in order to be internally consistent.[8] The words "take into consideration" not only modify "any expenses reasonably attributable to the earning of any such income," but they also modify "any other income and resources." The Tenth Circuit Court of Appeals recognized this construction when it stated:

> "The phrase 'take into consideration' is flexible and by itself does not require a particular treatment of

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[6] This provision is presently included in §402(a)(8)(B)(i) of the Act, 42 U.S.C. §602(a)(8)(B)(i). Pub. L. 90-248.

[7] "May" is used instead of "shall," and "all or any portion" is used instead of "any."

[8] The State repeatedly asks this Court to consider the Act as a whole (see p. 14 of petitioner's Biref). Respondents of course agree, but point out that the State has failed to consider even §402(a)(7) in its entirety.

> employment expenses. However, when considered in the statutory framework of 42 U.S.C. §602(a)(7), these words assume a particular meaning. It should be noted that the phrase 'take into consideration' modifies both 'income' and 'expenses'. Consequently, Congress intended employment expenses to be treated in the same manner as income." *Vialpando, supra,* at p. 734 (Single Appendix pp. 90-91).

It cannot be seriously contended that a state could satisfy the mandate to "take into consideration any other income and resources" by averaging the income or resources of all AFDC recipients and applying the average so derived to *each* AFDC budget.

The very purpose of the addition of §402(a)(7) to the Act in 1939, Pub. L. 71-379, §401(b), was to clarify that AFDC was to be provided *only* to "needy" families, and that the amount of assistance actually paid was to be based on the amount determined to be needed in the individual case after other income and resources were considered. See, for example, 45 C.F.R. §233.20(a)(3)(viii). Colorado's position with regard to the consideration of work expenses, if applied to the consideration of income, would permit it, for example, to "average" monthly child support payments and subtract this average from all appropriate budgets regardless of whether or not that amount was actually forthcoming in an individual case, or "average" the earned income of all recipients and budget the "average" in all appropriate cases. Such an interpretation would be antithetical to a "needs" related residual assistance program which assures that only such income as is actually available for current use on a regular basis will be considered in establishing need for and the amount of AFDC. 45 C.F.R. §233.20(a)(3)(ii)(c). See also *King v. Smith*, 392 U.S. 309 (1968); *Lewis v. Martin*, 397 U.S. 552 (1970).

The derivation of the present §402(a)(7) makes absolutely clear that the Respondent's textual interpretation of the section is the correct one. In 1939, the section read, in its entirety, as follows:

> "provide that the State agency shall, in determining need, *take into consideration any other income and resources* of any child claiming aid to dependent children." Pub. L. 76-379, §401(b) (Emphasis added).

There were no changes in §402(a)(7) until 1962 when it was amended to read as follows:

> "provide that the State agency shall, in determining need, *take into consideration any other income and resources of any child or relative* claiming aid to families with dependent children, *as well as any expenses reasonably attributable to the earning of any such income*. . . ." Pub. L. 87-543, §106(b) (Emphasis added).

Thus, Congress mandated that the states "take into consideration" (1) any income or resources and (2) any expenses reasonably attributed to the earning of any such income. Surely if Congress intended income and resources to be objectively determined on a case by case basis it would not have simply added the phrase "as well as any expenses" had it not similarly intended their determination to be on a case by case basis.

The Solicitor General agrees, as of course he must, that Congress intended income to be considered in the needs determination process on a case by case basis, see Solicitor General's Brief, p. 6, but argues that a different interpretation should be given to the phrase "take into consideration" when used with its object "expenses" than when used *in the same sentence* with its object "income", *ibid.* According to the Solicitor, "a single

word or phrase often takes on different meanings for each of its objects within the same sentence," as in the case of a hunter and a canoeist who "shoots both squirrels and rapids." *Ibid.* Acceptance of the Solicitor's proffered construction of §402(a)(7) would require the Court to impute to Congress the intention to legislate by resorting to a grammatical construction that has been characterized as probably the most common of puns, that is, the use of the same word with deliberately different meanings. See T. Kane and L. Peters, A Practical Rhetoric of Expository Prose, Oxford University Press (1966), p. 509. Mark Twain might well have used language in such a fashion; Congress seeking to mandate particular conduct in the public assistance programs, and expecting to be understood in the process, surely did not.[9]

Petitioner's view that limitations on work expenses are consistent with §402(a)(7) has been rejected by those courts that have interpreted the section, whether such courts were considering limitations upon the *types* of work expenses covered, e.g. *Connecticut State Department of Welfare v. HEW*, 448 F.2d 209, 216-217 (2d Cir. 1971); maximums on work expense deductions, e.g. *Williford v. Laupheimer*, 311 F. Supp. 720 (W.D. Pa. 1969) or flat standard allowances such as used by Colorado.

Thus, the Court of Appeals for the Second Circuit held that "all expenses reasonably attributable to the earning

[9] Kane and Peters (p. 509) quote the following pun from Mark Twain's writings:

> "Even as a schoolboy, poultry-raising was a study with me, and I may say without egotism that as early as the age of seventeen I was acquainted with all the best and speediest methods of raising chickens, from raising them off a roost by burning lucifer matches under their noses, down to lifting them off a fence on a frosty night by insinuating a warm board under their feet."

of income . . ." must be excluded from the computation of available income in determining eligibility and need. *Connecticut State Welfare Department v. HEW, supra* at 216 (emphasis added). The Court there approved *Williford v. Laupheimer, supra,* in which a three-judge court ruled that §402(a)(7) prohibited the imposition of a maximum for work-related expenses:

> "We think it obvious that the fifty dollar limitation on income deductions is inconsistent with the express provision of the Social Security Act. The imposition of such a maximum deduction violates the clear Congressional directive that the states shall allow deductions for 'any expenses attributable to the earning of such income.' The Commonwealth makes no claim that this limitation is inspired by any considerations other than attempt to preserve and protect its coffers. And although we may sympathize with the state's attempt to alleviate the unquestionably and increasingly heavy burden of programs such as AFDC, the solution of such problems resides in Congress. To date, it has not seen fit to impose any limitation on work-related income deductions; the states are not free to do otherwise." *Williford v. Laupheimer, supra,* at 722.

More recent cases, including the decision in the lower court, that have dealt with the limitation imposed by a flat allowance for work expenses, have been decided similarly. *Amos v. Englemen*, 335 F. Supp. 1199 (D.N.J. 1970);[10] *Conover v. Hall*, Civil Action No. 215815

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[10]The first case to deal with the issue of a flat allowance for work expenses was *Amos v. Engleman*, 335 F. Supp. 1199 (D.N.J. 1970). The court in *Amos* considered, among other issues New Jersey's $50 standard allowance for all expenses of employment other than the costs of child care and mandatory payroll deductions. The court held that such a standard deduction for work expenses was proper, there being nothing in the record to

(Sacramento County, Calif. Superior Court, October 8, 1971;[11] *Adams v. Parham*, ____ F. Supp. ____ (N.D. Ga., Civil Action No. 16041) (April 14, 1972);[12] *Campagnuolo v. White*, ____ F. Supp. ____ (D. Conn. No. 13,961) (June 22, 1972);[13] *Anderson v. Graham*, ____ F.2d ____ (8th Cir. December 20, 1973).[14] There is no

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establish that $50 was an unreasonable amount or that plaintiffs in the action incurred expenses in excess of it. In modifying language, however, the court found that it was not inconsistent with §402(a)(7) for the state to use a standard deduction provided the allowance is adequate to cover *all* actual expenses. The court's holding vis-a-vis work expenses was not an issue in a subsequent appeal and was therefore not part of this Court's decision to affirm, 404 U.S. 23 (1971).

As distinct from *Amos*, the plaintiff in the instant case (as in the other cases subsequent to *Amos* in which the flat work expense allowance was at issue) had actually incurred expenses in excess of the flat allowance amount, thereby squarely raising the issue before this Court.

[11] A copy of the decision in *Conover* is contained in Appendix B. *Conover* was reversed by the intermediate court in California, 104 Cal. Rptr. 77, 28 Cal. App.3d 676 (1972), but that decision has been rendered null and void by the granting of a hearing by the California Supreme Court on January 17, 1973, and, as a result, the preliminary injunction of the trial court restraining the operation of the state's flat work expense allowance is currently in effect. Upon the granting of a hearing by California's highest court, the opinion and order of the state's court of appeals "became a nullity and of no force or effect, either as a judgment or as an authoritative statement of any principle of law discussed therein." *Knouse v. Nimocks*, 8 Cal.2d 482, 483, 66 P.2d 438 (1937). "The decision of the state Court of Appeals is no more effective as a judgment than if it had not been rendered." *In re Kent's Estate*, 6 Cal.2d 154, 156, 57 P.2d 901, 902 (1936). See also *Miro v. Superior Court*, 5 Cal. App.3d 97, 84 Cal. Rptr. 874 (1970).

[12] A copy of the decision in *Adams* is contained in Appendix C.

[13] A copy of the decision in *Campagnuolo* is contained in Appendix D.

[14] A copy of the decision in *Anderson* is contained in Appendix E.

question that a flat allowance is as much a limitation upon the disregard of work expenses as is a maximum allowance or a limitation upon types of expenses allowed.[15] Thus, §4313.13 of the Colorado State Manual is violative of the clear language and meaning of §402(a)(7). Compare *Williford v. Laupheimer, supra,* and *Campagnuolo v. White, supra.*

The plain meaning of the work expense clause of §402(a)(7), as argued by Petitioners here and construed by the several courts cited above, is fully supported by the legislative history of the provision, and the purpose which Congress sought to achieve by its adoption.

B. The Legislative History of §402(a)(7) Reveals That All Reasonable Work Expenses Are To Be Fully Deducted in Determining the Amount of Net Income Actually and Currently Available to AFDC Applicants and Recipients.

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[15]It should be emphasized that Colorado's use of a standard work expense allowance is in no way justified or related to its undisputed power to set the level of benefits in the AFDC program. If Respondents prevail, and if costs in the AFDC program increase as a result (which we do not concede), Colorado may recoup such increases by adjusting the percentage of need which it has agreed to pay all recipients (currently at 100%). See *Rosado v. Wyman, supra; Jefferson v. Hackney, infra.* Such a reduction would not be directed only at working recipients and would be consistent with the state's power to determine total AFDC funding. See *King v. Smith, supra,* 42 U.S.C. §601. Colorado may not, however, curb its total AFDC expenditures by contravening a specific congressional command and thereby thwart the purpose Congress sought to achieve thereby. See *Connecticut State Dept. of Welfare v. HEW, supra; Arizona Dept. of Public Welfare v. HEW,* 449 F.2d 456 (9th Cir. 1971), *cert. denied,* 405 U.S. 919 (1972) [limitation on work expense disregard not justified by power to set level of benefits]; Cf. *Townsend v. Swank, supra; Carleson v. Remillard, supra; King v. Smith, supra.*

Although the states have been required to consider all income and resources since the early days of the AFDC program, the work expense disregard was optional with the states until 1962. As early as 1942, however, state welfare agencies were encouraged but not required by the Social Security Board to recognize the special financial circumstances of employed assistance recipients. Social Security Board, Bureau of Public Assistance, State Letter No. 4 (April 30, 1942), p. 1. The option continued and was made clear again in HEW State Letter No. 291 (March 11, 1957).

Against this background, recommendations were made and action ultimately taken to make the work expense disregard mandatory. Thus, in 1962, President Kennedy proposed changes in the federal public assistance program which stressed "services instead of support, rehabilitation instead of relief, and training for useful work instead of dependency." Hearings on H.R. 120032 before the House Committee on Ways and Means, 87th Cong., 2nd Sess. (February, 1962), p. 2. In a letter to John W. McCormack, Speaker of the House of Representatives, HEW Secretary Ribicoff described the proposed Public Welfare Amendments of 1962 as they related to the issue of work expenses:

> "To encourage assistance recipients to participate in the community work and training programs or take regular employment, full consideration of the additional expenses of employment would be required." *Id.* at p. 2.

The proposed amendment regarding the work expense disregard was summarized as follows in the Secretary's report:

> "Under current Federal policy, while States are required to consider any income and resources (with

certain exclusions in the case of Title X of the Social Security Act) in determining need, they are encouraged but not required to take into consideration expenses incurred in earning income. All public assistance titles of the act would be changed by the bill to require the consideration of necessary expenses that may reasonably be attributed to earning income. These changes would not become effective until July 1, 1963." *Id.* at p. 28.

Later, in hearings before the Senate Finance Committee, Secretary Ribicoff explained the practical effect of the requirement to Senator Curtis of Nebraska:

"Senator Curtis: . . . Now, on page 14 the bill before us requires that a State agency in determining need must take into account any expenses that may be reasonably attributable to the earning of income. The requirement is new; is it not?

Secretary Ribicoff: That is correct.

Senator Curtis: Explain how that would work.

Secretary Ribicoff: Well, basically, let us say that for a woman or a man to get a job he would have to take a train or a bus, and the transportation expenses might be $1 a day. He would have to be given credit for $1 a day, or, let us say, he had a job where he had to get special goggles or special safety shoes, items of clothing or let's say he had a job where he was required to buy uniforms. He might have a job in a gas station or a hotel, where the uniforms had to be bought.

Senator Curtis: A State can take those things into account now?

Secretary Ribicoff: They can. But not all of them do. What we are trying to do, Senator Curtis, is do everything we can to encourage people to get a job and work and we feel it is important to encourage

the States. By having this provision, the State will take into account these expenses so people will get jobs. I believe that *the State should give them an allowance for those items that are necessary for them to get the job.*" Hearings before the Committee on Finance, United States Senate, 87th Cong., 2nd Sess. (May 1962), p. 152 (Emphasis added).

In reporting out the Public Welfare Amendments of 1962, which were enacted into law, the Senate Report on the bill, S. Rep. No. 1589, 87th Cong., 2nd Sess., U.S. Code Cong. & Ad. News 1943, 1959-1960, explained the purpose of the new mandatory work expense disregard:

"Under the present law, all income of recipients of public assistance is taken into account (with a limited exception under Title X) in determining need. States are permitted, but not required, to take into consideration the expenses an individual has in earning any income (this practice is not uniform in the country and in a substantial number of States full consideration of such expenses is not given). The committee believes that it is only reasonable for the States to take these expenses *fully* into account. Under existing law if these work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter. The bill has, therefore, added a provision in all assistance titled requiring the States to give consideration to *any* expense reasonably attributable to the earning of income." (Emphasis added).[16]

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[16]The House Report, H. Rep. No. 1414, 87th Cong., 2d Sess., 23 (1962), contains, in essence, the same language.

As the legislative history to §402(a)(7) clearly reveals, the intent of Congress was to assure that working recipients would not suffer by their participation in employment. Thus, prior to 1962, in those states which did not disregard all expenses attributable to employment, a recipient frequently would be in a better position financially were he or she not working because of the expenses of employment. The 1962 amendments thus removed the disincentive to work by requiring the full disregard of reasonable work related expenses. Colorado's limitation on the disregard of work expenses, in the form of a $30 flat allowance, negates this legislative purpose and reinstates the disincentive removed by §402(a)(7).[17]

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[17]In 1967, further amendments to the Social Security Act provided a positive work incentive in §402(a)(8)(A)(ii) by allowing the AFDC recipient to disregard, not only work expenses, but a portion of his or her gross earned income as well. 42 U.S.C. §602(a)(8)(A)(ii). The work expense disregard, though working in conjunction with the earned income exemption, is nonetheless a separate and distinct legislative entity. In fact, the addition of the earned income exemption in §402(a)(8)(A)(ii), while necessitating an amendment of §402(a)(7) to assure conforming language, in no way diminished the requirement that any expenses reasonably attributable to the earning of income be taken into consideration. Indeed, the fact that Congress was cognizant of the work expense disregard when mandating in addition thereto the earned income exemption is proof of the independent vitality and importance of the work expense disregard. This is in contrast to the trial court's speculation that §402(a)(7) might be an anachronism in view of the later enactment of the earned income exemption provisions of §402(a)(8)(A)(ii). (See Single Appendix pp. 79-80). Further, it is important to note that §402(a)(7) was not the only disregard provision of general application prior to passage of §402(a)(8). While it may be true that it was the only existing disregard provision applicable to the AFDC program, it is important to understand that a mandatory earned income incentive for the AB program had been in existence since 1950. Indeed, that provision stood alone and was not accompanied by a work expense disregard

There have been several proposals over the years to amend the Social Security Act to provide a flat amount to be deducted from income to compensate for work related expenses regardless of actual reasonable expenses in the individual case, but none have been enacted to date, and §402(a)(7) stands as it was amended in 1962. For example, in the Administration's proposed Family Assistance Act of 1970, H.R. 16311, 91st Cong., 2d Sess., which was passed by the House of Representatives, the new Federally administered program would have abolished the work expense provision as a separate item and merged it with the positive work incentive exemption. The new provision would have disregarded from the earned income of all recipients $60 per month plus a fraction of the remainder instead of the present $30 per month plus a fraction of the remainder and all reasonable work expenses. See H.R. 16311, §101, proposing to add a new §443(b)(4) to the Social Security Act. Similarly, in passing the Administration's proposal again in 1971, the House provided a flat $30 amount to be added to the positive work incentive to replace the present work expense provision. H.R.1, 92d Congress, 1st Sess., §401, proposing to add a new §2153(b)(4) to the Social

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until 1962 when the work expense disregard became mandatory in AB and all other categorical assistance programs under the Social Security Act. In fact, the work expense disregard provision in each of the categorical assistance titles used exactly the same language. Subsequently, earned income exemptions, in addition to the work expense disregard, were enacted in AFDC, OAA, APTD, and AABD. In sum, the two provisions, i.e., the work expense disregard and the earned income incentive, were always treated separately, whether the work expense disregard was incorporated into the program before, e.g., APTD, OAA, AFDC, or subsequent, e.g., AB, to the earned income exemption.

Security Act. In explaining this provision the Committee on Ways and Means observed that it "would eliminate the open-ended work expense exclusion and, in its place, would increase the flat earnings exclusion." H. Rept. 92-231, Report on H.R.1, 92d Cong., 1st Sess. (1971), p. 177.

Of course, the Family Assistance Plans were never adopted, but Congress again has been asked by the Administration to replace the "open-ended" work expense provision of §402(a)(7) with a flat $30 amount in the context of the present AFDC program. See S.2311, 93d Cong., 1st Sess., and H.R. 3153, §162, 93d Cong., 1st Sess. (passed by the Senate on November 30, 1973). What Colorado seeks to do under the present AFDC program, and what the Solicitor General seeks to justify, is the revision of an Act of Congress without waiting for the Congress to place its imprimatur on the policy they favor. It is up to Congress to amend §402(a)(7), not Colorado, not HEW, and not this Court.

C. Neither *Rosado v. Wyman* Nor Mere Claims of Administrative Efficiency Justify an Averaging of Work Expenses Under §402(a)(7).

The Solicitor General states that it is the judgment of the Secretary that work expenses may be taken into consideration by the States in the same manner as other living expenses, i.e., "on the basis of statistical averages". *Rosado v. Wyman*, 397 U.S. 397, 419. This decision is the major underpinning of the Secretary's averaging theory. HEW's position, succinctly, is that since the Supreme Court authorized state AFDC programs to consolidate items of need in the state's standard of need by statistically averaging those items, states may similarly "average" work-related expenses and apply the resulting amount to all cases regardless of actual amount.

Respondents will demonstrate that the agency's and, in turn, the Petitioners' reliance on *Rosado* is misplaced.

The question before this Court in *Rosado* was resolved only after a review of the specific requirements embodied in §402(a)(23) [*not* §402(a)(7)], the legislative history of that section, and the general framework of prior legislation in the area of need standards. Upon analysis it is clear that the decision was not intended as a blanket approval for some philosophical principle of "averaging" without regard to *what* is being averaged, *why* it is being averaged, or the *effect* its being averaged will have on implementation of specific congressional objectives.

A standard of need consists of a dollar amount which represents the total cost of those items which a state has determined to be necessary to maintain a subsistence level of living; it may be expressed as a single flat amount available for all families, or it may contain, in addition, certain special need items which are included in a family's budget only when need for the particular item is demonstrated in a given month. See *Rosado v. Wyman, supra*; 45 C.F.R. §233.20(a)(1), (2). By its very nature, a standard of need is merely an estimate by the state welfare officials as to the minimum financial requirements of the state's poor. There is no provision of the Social Security Act, however, which explicitly sets forth the requirement that a standard of need be established or which specifies how such a standard be constructed. Such a standard was required by the federal government based on a reading of the Act's requirements that need for assistance be determined by considering all income and resources, 42 U.S.C. §602(a)(7), and that AFDC be furnished only to "needy" families, 42 U.S.C. §§601, 606. Obviously some standard was necessary against which such income and resources could be compared.

Given the lack of explicit statutory requirements for a standard of need, and the congressional determination to require states to provide assistance only "as far as practicable under the conditions in [each] State," 42 U.S.C. §601, *Dandridge v. Williams*, 397 U.S. 471, 478 (1970), HEW and its predecessor agencies have, since 1936, permitted the states almost unfettered discretion in determining the items to be included in the standard, and in establishing the prices of the items which were so included. See *King v. Smith*, 392 U.S. 309, 318, footnote 14; HEW *Handbook*, Pt. IV §3120. See also *Lampton v. Bonin*, 299 F. Supp. 336, 349 (1969) (Cassibry, dissenting).[18] In contrast to the requirement that *any* work-related expenses be considered, there is nothing in the Social Security Act which demands that all needs be satisfied by the AFDC program.[19]

Thus, prior to 1967 there was little or no control on state need standards.[20] Section 402(a)(23), signed on

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[18]HEW has, however, required the states to determine need on an "objective and equitable basis." 45 C.F.R. §233.20(a)(1).

[19]As originally introduced, the Act required that the state provide AFDC in sufficient amounts that, when combined with other income, a "reasonable subsistence" compatible with "health and decency" could be obtained. H.R. 4120, 74th Cong. 1st Sess. §204 (1935). This provision was eliminated from the bill reported out by the House in deference to state's rights advocates and the "as far as practicable" language was inserted in its place. Witte, *Development of the Social Security Act* (1962); DeForest, Rubin, Wynia, *Legislative History of the AFDC Program* (BSSR, 1970), p. 48.

[20]This explains why provision for work-related expenses as a *special need item* in the standard of need, was merely "encouraged" by HEW prior to 1962, and was not adopted by all the states, nor fully adopted by many of the states which provided for *some* expenses. It was Congress' decision in 1962 to treat work expenses very differently than other items of need, i.e. to mandate their consideration, despite the fact that they were "simply additional items of living expense." See Solicitor General's Brief, p. 7.

January 2, 1968, provided that each state AFDC plan must

> "provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

This Court has found only two purposes to this statute:

> "First, to require States to face up realistically to the magnitude of the public assistance requirements and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis." *Rosado v. Wyman*, 397 U.S. at 412-14; *Jefferson v. Hackney*, 406 U.S. 535, 542 (1972).

The first purpose is the one relevant to the averaging question. This Court held that New York could not completely eliminate special need items from its standard, since that would "circumnavigate around the requirement of re-evaluating its existing standard," 397 U.S. at 415, but that New York could "redefine its method for determining need" by a "fair averaging" of those special need items. 397 U.S. at 419. The latter would be consistent with §402(a)(23) because the consolidated standard would, after the necessary cost-of-living adjustment, satisfy the statute's purpose to adjust grant levels to reflect current prices. A statistical averaging of special need items would not thwart the congressional scheme to require the states to raise the

average payments or suffer the "political consequences" of a percentage reduction. 397 U.S. at 413.[21]

The key to *Rosado* is that §402(a)(23)'s very limited purposes could be satisfied without taking away from the states the broad power they had to define and construct a standard of need prior to its enactment. The Court explained its interpretation of §402(a)(23) as follows: "[a]n extensive alteration in the basic underlying structure of an established program is not to be inferred from ambiguous language that is not clarified by legislative history." *Rosado*, 397 U.S. at 414, footnote 17. Section 402(a)(7) and its purposes, on the other hand, stand in sharp contrast to §402(a)(23). While it is true that prior to 1962 the states had flexibility to include or not include work expenses in the standard of need (consistent with its general flexibility in that area), the amendment that year to §402(a)(7) specifically and purposefully ended that latitude.

First, as noted earlier, the 1962 amendment to §402(a)(7) required work expenses to be offset against *income*. See 45 C.F.R. §233.20(a)(7)(ii). In the consideration of income, however, states have *never* enjoyed the flexibility that they had in the establishment of need standards. Unlike the determination of a subsistence standard of need, the evaluation of income is an objective determination and, as noted earlier, Congress intended

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[21] While some families are hurt, and others benefited by a fair averaging, 397 U.S. at 419, the statutory purpose of §402(a)(23) is fully satisfied. The consolidated standard must be adjusted to account for cost-of-living increases, and that adjustment will "lay bare" the extent to which the "average" standard of need fails to meet current economic realities, and will force the state to choose between a percentage reduction or the maintenance of greater AFDC budgets.

that it be done for all applicants and recipients on a case by case basis. The Tenth Circuit recognized this basic distinction between averaging for purposes of setting a standard of need and disregarding work expenses, when it stated:

> "Additionally, an understanding of the manner in which a state's standard of need and the computation of a particular family's available income and resources under 42 U.S.C. §602(a)(7) compliment each other illustrates the incongruity of Colorado's standardized employment expenses allowance in the instant case. The standard of need is a dollar amount representing the costs of those items which a state has determined to be necessary to maintain a hypothetical family at a subsistence level. Such an estimate by its nature is susceptible to computation through the use of statistical averages and it was thus fitting for the Supreme Court to approve the use of an averaging system in *Rosado. Vialpando v. Shea*, 475 F.2d 731, 734 (Single Appendix, p. 92).

Moreover, the "averaging" of work-related expenses runs directly *counter* to the purpose of the 1962 amendments as well as to its plain meaning. As noted in *Rosado*, some families are benefited, other families are harmed, by an "average," but, as demonstrated above, the purpose of §402(a)(7) is to provide all individuals with an incentive to work, and to guarantee to *all* recipients that they would not be penalized if they chose to work. It makes little sense in this context to determine with precision the income actually earned by the working recipient, or actually contributed to her support from responsible relatives, and then "assume" an amount of work expenses which leaves her with an "assumed" net income with which to meet her needs but which is

concededly not available to her for that purpose. In short, while *Rosado* held that §402(a)(23) was not inconsistent with a consolidation of special need items into a flat grant, that case lends no support to a completely dissimilar "averaging" of work expenses which states are mandated to disregard under §402(a)(7). *Accord, Conover,* Appendix B; *Adams,* Appendix C; *Campagnuolo,* Appendix D; *Anderson,* Appendix E.

The Welfare Department urges, however, that §402(a)(7) not be interpreted in isolation, and that, considered with other provisions of the Act, it should be read to permit the use of a flat work expense standard to limit the consideration of actual work expenses incurred by the Respondent. The Welfare Department argues that the objectives of administrative efficiency and state-wide uniformity justify its position in favor of a flat standard. While Respondent does not dispute that different sections of the same statute should be read in harmony and interpreted so as to avoid conflict with each other, it is Respondent's view that the statutory objectives advanced by Petitioners can be satisfied *within* the framework of the §402(a)(7) requirement that "any" work-related expenses be considered, and thus they do not justify departure from that plain mandate.[22]

The "administrative convenience" rationale also urged by the Solicitor General, is belied by HEW's own justification for that position. HEW has outlined the

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[22]It should be noted that even in *Rosado* the Court held that the "laudable goal of administrative efficiency" may not be furthered in such a way as to violate a specific statutory command. *Rosado*, 397 U.S. at 417. Thus the Court construed §402(a)(23) in such a way as to permit administrative efficiency *and* satisfy the purpose of that section.

alleged administrative problems attendant upon individualized work expense determination as follows:

> "Payroll deductions vary with the amount of wages, and wages vary with the number of paydays in a month, the number of days the recipient worked, overtime, and many other factors. Other work expense items, such as transportation and lunches, vary similarly with the number of days of work and the other factors which affect payroll deductions, and in addition they may vary according to any number of still other factors. Under an individualized computation, the amount of work expenses for each individual would likely be different every month. For the agency to obtain an adequate accounting of the individualized expenses, to process the changing amounts, to validate and audit, places a severe burden on administration of the program. Increasingly, agencies have neither the staff nor the capability for such an operation." (See Appendix E, p. 15, Brief of California in Support of Petition for Certiorari).

However, each of those determinations must be made *even in those states which choose to standardize work-related expenses.* If wages and days worked frequently vary as HEW argues they do, the assistance grant would have to be recomputed *each* month without regard to work expenses in order to accommodate the changes in income since all available income not specifically exempted must be taken into consideration in the determination of need under §402(a)(7). Moreover, Colorado has *not* standardized payroll deductions, and so, individualized determinations of the kind described by HEW still have to be made and, if HEW is right, have

to be made frequently. Administrative efficiency is thus not furthered by Colorado's program.[23]

Respondent does not argue here that the Welfare Department may not, in furtherance of the objective of administrative efficiency, use a flat amount as a "standard deduction". *Assuming the flat amount to be a reasonable one* (Colorado's is not, see footnote 4, *supra*), Colorado may streamline its system by applying such a deduction to all working recipients subject to permitting such recipients to itemize expenses if greater than the standard. This was the holding in *Adams, Conover, Compagnuolo,* and *Anderson,* and indeed was suggested by the court below:

> "The problem with the Colorado system is not its use of a standardized allowance but the intransigent adherence to this standard when a particular family's expenses of employment exceeded the allowance. In such cases, Colorado's standard allowance operated as a maximum allowance which we also consider to be inconsistent with 42 U.S.C. §602(a)(7). Williford v. Laupheimer, E.D. Pa., 311 F. Supp. 720 (three-judge court). Nevertheless, a reasonable interpretation of the statute permits 'a state to use a standard deduction for [employment] expenses in the interest of efficient administration of the [AFDC] program, provided the allowance is

[23]Indeed, Colorado does not standardize any work expenses for employed food stamp applicants, and so after applying the standard $30 to an AFDC applicant's income, eligibility workers must nonetheless make an individualized determination of those expenses in order to compute that individual's food stamp bonus entitlement. See Colorado Public Welfare Manual, Section C-4421.2-.23 in Appendix G and a copy of the Working Recipient's food stamp worksheet in Appendix H.

adequate to cover all actual expenses.' " *Vialpando v. Shea*, 475 F.2d 731, 735 (10th Cir. 1973) (Single Appendix, pp. 92-93).

A standard so applied would be comparable to the "standard deduction" for federal income tax purposes, see I.R.C. §141, 26 U.S.C. §141, and would provide (in most cases) relief for the Welfare Department from the accounting, processing, validating and auditing which HEW apparently believes places a severe burden on administration of the program.[24] On the other hand, should such a method be adopted, recipients with work expenses in excess of the "standard" would have the option of proving that to an eligibility worker.

Finally, the demands of statewide uniformity, 42 U.S.C. §602(a)(1), (3), may surely be accomplished consistent with our interpretation of §402(a)(7). Respondents do not argue that the determination of work expenses should be made on an *ad hoc* basis, subject to the whim and fancy of particular county departments, or particular caseworkers. It is Respond-

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[24]Respondents wonder how crucial a standard, without provision for demonstrating expenses in excess thereof, is to the efficient administration of the AFDC program. Under §402(a)(5), 42 U.S.C. §602(a)(5), a state AFDC plan "*must . . . provide* (A) Such methods of administration . . . as are found by the Secretary [of HEW] to be *necessary* for the *proper* and efficient operation of the plan. . . ." HEW has not *required* states to use standardized work expense allowances under this section; it is merely an "option." Is this failure to so mandate due to the Secretary's view that such a standard is not "necessary" for efficient operation of the program? If so, we urge that the plain meaning of §402(a)(7) should not be abrogated by HEW's *ad hoc* determination. Indeed, is the "option" afforded the states on the theory that a standard work expense is not "proper" under §402(a)(7)?

ents' position that the State Welfare Department should, indeed *must*, develop criteria of statewide applicability which will be used by all eligibility workers to evaluate requests by welfare recipients for the consideration of particular work expenses. Compare 45 C.F.R. §233.20(a)(2)(v), applicable in the case of special needs.[25]

Even though administrative efficiency is a laudable goal, the state may not implement measures which are inconsistent with the specific requirements of the Social Security Act. See *Rosado v. Wyman*, 397 U.S. 397, 417 (1970).

D. Federal Regulations, Promulgated Contemporaneously with the Enactment of the §402(a)(7) Work Expense Disregard and Codified Thereafter, Require the Disregard of All Reasonable Work Related Expenses.

The Solicitor General in his brief urges this Court to accept the use of statistical averaging to determine work expenses. In doing so, the Solicitor General fails to make any extensive analysis of the statutory language, its legislative history or the federal regulations promulgated by HEW contemporaneously with the enactment of the statute. Those regulations are inconsistent with the interpretation now urged by the Solicitor General.

The HEW regulations start with the fundamental proposition that "only such income as is actually

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[25] 45 C.F.R. §233.20(a)(2)(v) provides as follows:

"If the State agency includes special need items in its standard, (a) describe those that will be recognized, and the circumstances under which they will be included, and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them."

available for current use on a regular basis will be considered. . . ." 45 C.F.R. §233.20(a)(3)(ii)(b). This principle is then applied to work expenses: "income *equal* to expenses reasonably attributable to the earning of income" is not to be regarded as available income. 45 C.F.R. §233.20(a)(3)(iv)(a) (emphasis added). In addition, §233.20(a)(7)(i), describing the method for the disregard of earned income, requires that "all" work expenses, personal and non-personal, be deducted in determining net available income. These regulations do not, obviously, simply "restate" the statutory language as the Solicitor General suggests. (Brief, p. 4). Furthermore, Federal regulations, in defining "earned income" for purposes of applying the earned income exemption separately provided for in §402(a)(8) as the "total amount, irrespective of" personal and non-personal work expenses, merely give *examples* of such work expenses. See 45 C.F.R. §233.20(a)(6)(iv) ("expenses such as . . ."),[26]

These regulations codify HEW's previous requirements contained in the *Handbook of Public Assistance Administration*, Pt. IV, §3140(1), promulgated contemporaneously with the enactment of the work expense disregard of §402(a)(7).[27] The Handbook satisfied the strict requirements of the Social Security Act and the

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[26]It is significant that HEW has merely provided examples of the types of work expenses that are to be disregarded. To have provided an exhaustive list would have violated the controlling criteria that a work expense is any item of expense "reasonably attributable to the earning of income"; such a list would thereby have created an improper limitation on the work expense disregard.

[27]See Single Appendix pp. 4-6.

need for administrative efficiency by providing that while a state agency may establish a reasonable standard money amount to represent costs for extra food, clothing and personal incidentals, since these items are "accepted, common needs of all employed persons," "[i]tems of work expenses must be allowed when there is a determination that such expenses do, in fact, exist *in the individual case*." (Single Appendix, pp. 4-5, emphasis added). The *Handbook* proceeds to list specific examples of expenses which must be allowed when incurred. The Solicitor General agrees that these *Handbook* provisions do require a "higher work expense deduction" when an individual incurs expenses in excess of any standard which may be used. See Solicitor General's Brief, p. 4.

Faced with its contemporaneous and continuous interpretation of the 1962 work expense amendment to §402(a)(7), an interpretation entitled to great weight, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), HEW seeks to avoid the consequence of this prior construction of the statute both by arguing that the *Handbook* has been superceded, which is not true,[28] and by ignoring the specific language of the above cited regulations which were published by HEW and which purportedly superceded the *Handbook*.

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[28]In the trial court, the state's brief asserted that the *Handbook* had no validity, force or effect. Correctly, the state has changed its position before this Court. (See Petitioner's Brief, p. 24). It is clear that the *Handbook* is still viable as interpretative material to the extent it does not conflict with subsequently codified regulations. When the *Handbook* was codified in 45 C.F.R. §233.20, it was superseded only as a *system* for issuing materials and is thus still an effective statement of agency policy and interpretation. See Appendix F.

The *ad hoc* interpret ation of the statute (i.e. made only in response to laws uits, and not in published form) is entitled to little weig ht given the prior administrative interpretation and Cor gress' failure to disturb that construction over the p ast 12 years. See *U.S. v. Leslie Salt Co.*, 350 U.S. 383 396-97 (1956). The fact that HEW has, by approv ing Colorado's work expense allowance method, give approval to violation of HEW regulations and the autho rizing statute in no way deprives the Court of its powe r to require that the Colorado program be administer ed in accordance with those regulations, which are consistent with the statutory provision and its legislati e history.

The State of Colorad o repeatedly emphasizes that it properly relied upon H W, and, therefore, because the position of HEW shou ld be accorded great weight, enforcement of Colorad o's regulation on work expenses should not be enjoined As the Court below properly observed, this principle is inapplicable when a depart- mental interpretation is inconsistent with the controlling statute. *Vialpando v. Sh ea*, 475 F.2d 731, 735 (1972). See *Townsend v. Swank* 404 U.S. 282, 286 (1971). As the trial court noted, nc amount of deference to HEW's technical knowledge and administrative experience would justify the court rewriti ng §402(a)(7) or contorting its meaning. (Single Append ix, pp. 80-81).[29]

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[29]The Solicitor General a gues that the HEW view has evolved over a period of time, in rec gnition of the practical necessities of administration. (Solicitor G neral's Brief, pp. 4-5). It has been candidly admitted that the Secretary has shifted his position. However, because of the nat re of this proceeding, there has never been any competent evidenc e introduced before the lower courts to support this claim of inc reased efficiency. The parties hereto filed motions for summary j dgment; there were no stipulations of fact that statistically deter mined standard allowances produce

CONCLUSION

The arguments of deference to HEW and increased administrative efficiency miss the issue. The issue is whether or not HEW and Colorado have complied with 42 U.S.C. §602(a)(7). A clear analysis of the statute, its legislative history, the regulations and cases require the judgment for Respondents to be affirmed.

The Courts of Appeal for the Second Circuit, Tenth Circuit and recently the Eighth Circuit support Respondents' position.[30] Congress intended to provide a meaningful incentive for welfare recipients to return to the job market. Mrs. Ascension Vialpando, during the course of this protracted litigation, has taken marginal employment on several occasions, each time returning to a full ADC grant, because the Colorado Department of

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increased efficiency and savings or that Colorado's $30 flat allowance was fairly determined. Nevertheless the State and now the Secretary put forth these factual arguments. The Solicitor General in a footnote improperly refers to a Los Angeles County Work measurement study. Respondents have never seen this study nor been afforded the opportunity to cross examine its authors. (Solicitor General's Brief, p. 5).

[30] *Connecticut State Dept. of Welfare v. HEW*, 448 F.2d 209 (2nd Cir. 1971); *Vialpando v. Shea*, 475 F.2d 731 (10th Cir. 1972); *Anderson v. Graham*, ___ F.2d ___, (8th Cir. Dec. 20, 1973).

Social Services fails to disregard all her reasonable work expenses.

For these reasons, the judgment of the circuit court should be affirmed and a permanent injunction issued against the enforcement of §4313.13, Colorado Division of Public Welfare Manual.

Respectfully submitted,

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APPENDIX A

THE ACTUAL OPERATION OF THE WORK EXPENSE DISREGARD

Section 402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7), requires AFDC state plans thereunder to provide that, in determining the need for assistance of an applicant or recipient, the state agency shall take into consideration any income of such individuals "as well as any expenses reasonably attributable to the earning of any such income." This work expense disregard is separate from and different than the earned income exemption (explained in detail below) provided for in §402(a)(8)(A)(ii) of the Act, 42 U.S.C. §602(a)(8)(A)(ii). Thus, whether or not the earned income disregard of §402(a)(8)(A)(ii) is applicable, work expenses, at the very least, are to be deducted from earned income in determining the amount of net income actually and currently available to meet the needs of a particular assistance family.

As pointed out in the text of the brief, the work expense disregard of §402(a)(7) operates basically in two instances: (1) in determining the eligibility of most applicants for AFDC, and (2) in computing the amount of the assistance payment of recipients and eligible applicants.

In order to determine whether or not an applicant for AFDC is eligible for assistance, his or her *net* earned income must be less than the state's standard of need. 45 C.F.R. §233.20 (a)(7)(ii). "Net earned income" is defined as a family's gross earned income less any work expenses, while a state's "standard of need" is that dollar amount which the state has determined to be necessary to provide a subsistence level of living. See 45 C.F.R. §233.20(a)(3); HEW Handbook of Public Assistance

Administration, Part IV §§3120, 3131. If the net earned income is *greater* than the state's standard of need for that particular family, the family is ineligible for assistance; if the net earned income is *less* than the state's standard of need, i.e., a family does not have enough income to meet its basic needs, the family is eligible for assistance.

For example, an applicant family, whose monthly needs have been determined by the state to be $200, and which has a gross monthly income of $270, mandatory payroll deductions of $25 and other work related expenses of $60, has its eligibility determined in the following manner:

Example #1

Gross Earned Income	$270
Less mandatory payroll deductions	-25
Less other work expenses	-60
Net earned income	$185

Net earned income ($185) being less than the state's standard of need ($200), the family is eligible for assistance.*

Those applicants thus found eligible for AFDC, as well as those already in receipt of AFDC, are entitled to the application of *both* the earned income disregard, as provided for in §402(a)(8)(A)(ii) *and* the work expense disregard, as provided for in §402(a)(7).** The §402(a)

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*This process is likewise described in Colorado State Manual §4313.132.

**It is to be noted that those applicants for AFDC who had received an assistance payment in any one of the previous four months are, like current recipients, automatically entitled to the earned income disregard whether or not their net income is below the standard of need. 42 U.S.C. §602(a)(8)(D), 45 C.F.R. §233.20(a)(11)(ii).

(8)(A)(ii) earned income disregard in the AFDC program requires that the first $30 of the gross monthly earned income, plus one-third of the remainder of such income, of any child, relative or individual whose needs are taken into account in determining the assistance budget, must be disregarded in determining the amount of the assistance grant. 42 U.S.C. §602(a)(8)(A)(ii). Together with the work expense disregard, the earned income disregard operates as specified in 45 C.F.R. §233.20(a)(7)(i):

> Provide that the following method will be used for disregarding earned income: the applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income", and all work expenses, personal and non-personal will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

For purposes of illustration, the figures in the previous example are used again, namely, gross earned income = $270; mandatory payroll deductions = $25; other work-related expenses = $60; state's standard of need = $200.

Example #2

Exemptions

Gross earned income	$270
Less $30 + 1/3 earned income exemption	
First $30: 270 - 30 = 240	
1/3 of remainder (240) = 80	
Earned income disregarded (30 + 80)	-110
	$160
Less mandatory payroll deductions	-25
Less other work-related expense	-60
Net available income	$ 75

Assistance Grant

State's standard of need	$200
Less net available income	-75
Assistance grant	$125*

In contrast, the $30 flat allowance for work expenses (other than mandatory payroll deductions) necessarily and adversely affects eligibility for and the amount, if any, of the assistance grant. Thus, in contrast to the above described Example #1, the applicant would be found ineligible rather than eligible for assistance; said applicant, instead of having countable income (gross income less exemptions) of $75, is assumed to have net income ($215) greater than the state's standard of need ($200):

Example #3

Gross earned income	$270
Less mandatory payroll deductions	-25
Less $30 flat work expense allowance	-30
Assumed net income	$215

Were the applicant to meet the four month rule of §402(a)(8)(D), he or she, like the current employed recipient, would nonetheless have his or her grant reduced by operation of the $30 flat allowance:

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*This process is similarly described in Colorado State Manual §4313.131.

Example #4

Exemptions

Gross earned income	$270
Less $30 and 1/3	-110
	$160
Less mandatory payroll deductions	-25
Less $30 standard for other work expenses	-30
Net available income	$105

Assistance Grant

State's standard of need	$200
Less net available income	-105
Assistance grant	$ 95

The resulting assistance grant of $95 should be compared to the $125 grant the recipient would be eligible for were his or her *full* reasonable work expenses disregarded. See Example #2.

APPENDIX B

[Filed Oct. 8, 1971]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

SALLY LEE CONOVER, ALICE ANN LAWRENCE, AND ARLOENE TOSELAND, on behalf of themselves and all others similarly situated, Plaintiffs, vs. JAMES M. HALL, Secretary, Human Relations Agency, State of California; ROBERT B. CARLESON, Director, Department of Social Welfare, State of California, Respondents.	No. 215815 Dept. 9 OPINION ON REQUEST FOR ISSUANCE OF PRELIMINARY INJUNCTION

This Court is being asked to preliminarily enjoin the defendants from taking any action to enforce §28.1 of the Welfare Reform Act of 1971, Cal. Stats., Ch. 578, or any regulation promulgated pursuant thereto or both, insofar as said action would result in the imposition of a $50.00 maximum allowance on work-related expenses exclusive of child care. Under the statutes and regulations in effect in California up until October 1, 1971, recipients of AFDC work supplements were allowed the full amount of their work-related expenses subject only to the limitations imposed by defendants on the amount allowed for personal items such as clothes and lunches ($25.00). These expenses, amongst others included transportation costs, Federal withholding income tax, State Disability Insurance, Social Security (FICA), retirement

contributions, union dues, together with the $25.00 standard deduction for food, clothing and miscellaneous.

Section 28.1 of the Welfare Reform Act of 1971, added §11451.6 to the Welfare and Institutions Code which reads in part as follows:

> "Notwithstanding §11008, any exemptions from earned income for work-related expenses authorized under other provisions of this Chapter shall be limited to a standard allowance of fifty dollars ($50.00) per month plus reasonable and necessary costs of child care. . . ."

It is plaintiff's contention that Section 28.1 of the Welfare Reform Act of 1971, and implemented by State Regulation filed September 29, 1971 (Ex. Def. C) is contrary to and inconsistent with supervening Federal law, specifically §402(a)(7) of the Social Security Act of 1935, as amended, 42 USC §602(a)(7) and implementing regulations which require that a certain portion of earned income will be disregarded in determining the amount of public assistance payments in order to provide welfare recipients an incentive to obtain employment to enable them to attain or retain capability for self-support. Federal statute requires that ". . . . the State agency shall, in determining need, take into consideration . . . . any expenses reasonably attributable to the earnings of such income." 42 USC §602(a)(7). Plaintiffs place great reliance for their position upon U.S. statutes, Federal cases and the recent California Supreme Court decision of County of Alameda vs. C.W.R.O. ___Cal.3rd___ at page wherein the Court said with approval "A similar issue was raised in Willeford . . . . wherein the State of Pennsylvania attempted to impose a $50.00 maximum upon the work-related expenses deductions under Section 602, subdivision (a)." The Court agreed (quoting from Willeford vs. Loupheimer, 311 F. Supp. 720 (E.D. P.A. 1969)

that the limitation was not permitted by the Act and HEW regulations thereunder, and concluded as follows: "We think it obvious that the fifty dollar limitation on income deductions is inconsistent with the express provisions of the Social Security Act. The imposition of such a maximum deduction violates the clear Congressional directive that the States shall allow deductions for "any expenses reasonably attributable to the earning of any such income."

The California Supreme Court also said in County of Alameda vs. C.W.R.O. (supra) at page 33: "The legislative history underlying the work-related expenses deduction provision indicates that it was the intent of Congress to permit the exclusion of *all* such expenses, without regard to the amount expended, provided that such expenses were reasonably related to employment."

It is the State's position that the language of Section 28.1, "shall be limited to standard allowance of fifty dollars ($50.00) per month," is not a limitation of work-related expense in non-conformity with Federal statutes and regulations, but rather a standard allowance for work-related expenses, created for administrative convenience in implementing the Social Security Act and permissible under the authority of Rosado vs. Wyman, 397 U.S. 397, Amos vs. Engleman (D.C.N. 4 1970), County of Alameda vs. C.W.R.O. ___ Cal. 3rd. ___ and the opinion of Phillip Schafer, Regional Commissioner of the U.S. Department of Health, Education and Welfare.

However, this Court is of the opinion that defendants are misconstruing Rosada vs. Wyman, 397 U.S. 397, in concluding that the Court's approval of a state drawing a statistical average of individual variation in a standard of need can be translated to §402(a)(7) of the Act to support a fifty dollar ($50.00) maximum. Such a conclusion would be in contradiction of the express

language of USC 402(a)(7) which requires that a state take into consideration "any expenses reasonably attributable to the earnings of such income."

It appears to this Court that the Congressional requirement that consideration be given to "any expense reasonably attributable to the earning of such income" precludes a fifty dollar ($50.00) maximum absent some provision to permit allowance of expense in excess of the fifty dollars in the individual case where properly substantiated. It therefore appears to the Court that §28.1 of the Welfare Reform Act of 1971 and the implementing regulation (Def. #C) adopted September 29, 1971 are invalid.

The Request for Issuance of a Preliminary Injunction is hereby granted.

DATED: Oct. 8, 1971.

/s/ _____
PRESIDING JUDGE OF
THE SUPERIOR COURT

APPENDIX C

[Filed Apr. 14, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTINE ADAMS, Individually and On Behalf of All Others Similarly Situated, Plaintiff	:	
EDITH ABRAMS, Applicant for Intervention as Plaintiff	:	CIVIL ACTION NO. 16041
vs.	:	
T.M. PARHAM, Individually and In His Official Capacity as Director of the State Department of Family and Children Services, Defendant	:	

ORDER

In this suit brought under 42 U.S.C. §1983, plaintiffs challenge the State of Georgia's plan for Aid to Families with Dependent Children (AFDC) as violative of 42 U.S.C. §602(a)(7) and Social Security Regulations. Jurisdiction is conferred upon the Court by 28 U.S.C. §1343(3). Pursuant to Fed. R. Civ. P. 65(a)(2), the Court consolidated the hearing on plaintiffs' motion for preliminary injunction with the trial on the merits. At the January 18, 1972, hearing, the Court ruled that the suit could proceed as a class action with plaintiff Adams and intervenor Abrams as class representatives, and issued

temporary injunctive relief with respect to the individual parties. The Court allowed the parties to file briefs and allowed the Department of Health, Education and Welfare to file a brief as *amicus curiae*. The case is submitted for final adjudication.

Under Section 407(a)[1] of the Social Security Act of 1934, as amended, states which choose to participate in the jointly-funded AFDC program, in determining eligibility, are obliged to consider the earned income of employed individuals who apply for or receive benefits. In assessing the amount of income, however, the same statute requires the states to consider "any expenses reasonably attributable to the earning of any such income." Pursuant to these requirements, the Georgia AFDC Plan provides that employed AFDC applicants and recipients have deductions from earned income as follows: (1) actual cost of child care; and (2) a flat amount of $35 for all other employment expenses.[2] Plaintiffs contend that the "flat amount" provision does not meet federal statutory requirements.

The State's reasons for using the standard deduction for work-related expenses are stated as follows:

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[1] "(a) A State plan for aid and services to needy families with children must . . . (7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual living in the same home as such child and relative whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; . . ." 42 U.S.C. §602(a)(7).

[2] In addition, as required by 42 U.S.C. §402(a)(8), the first $30 of the combined earned monthly income of all individuals whose needs are included in an AFDC grant plus one-third of the remaining is disregarded in determining eligibility.

"1. To significantly reduce the incident of error in this area which was repeatedly disclosed by Quality Control findings and as an incidence to other internal agency studies.

"2. To reduce to a minimum staff time and effort required to determine net income.

"3. To expedite the disposition of case actions (applications, special reviews, and redeterminations of eligibility), so as to make a payment to the recipient in the *correct* amount at the earliest possible date.

"4. To eliminate the impossible task of over 3,000 caseworkers in the 159 county offices applying to each individual recipient's factual situation the test of work-related expenses '*reasonably attributable*' to producing such income (much like a 'proximate cause' determination in tort cases—where do you draw the line) resulting in gross inequities between recipients in reasonably similar circumstances."[3]

The Court is aware of the increasing administrative problems which attend the implementation of the various public assistance plans which the State of Georgia administers in cooperation with the federal government. The Court also recognizes the desire and obligation of the State to operate the AFDC program as efficiently as possible. The use of the standard deduction, no doubt, would help achieve this result. At the same time, however, the State's AFDC Plan must comply with federal requirements. *E.g., King v. Smith*, 392 U.S. 309 (1968).

At least two other courts have had occasion to consider substantially the same issue involved here. In

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[3]Defendant's Reply Brief at 10.

Williford v. Laupheimer, 311 F. Supp. 720 (E.D. Pa. 1969), a three-judge court held Pennsylvania's maximum deduction ($50 per month) for work-related expenses invalid as inconsistent with Section 402(a)(7) of the Social Security Act. In *Vialpando v. Shea*, ___ F. Supp. ___ (No. C-2449, D. Colorado, January 13, 1972), the Court invalidated Colorado's flat amount ($30 per month) deduction for work-related expenses for the same reason.

Despite the understandable position of the State and the official approval of the Department of Health, Education and Welfare,[4] the Court cannot reconcile use of the standard deduction for work-related expenses with the legislative history and language of Section 402(a)(7) of the Social Security Act and regulations promulgated pursuant thereto. While the allowance of a flat, standardized amount for certain expenses (*i.e.*, food, clothing and personal incidentals) may comport with Section 402(a)(7),[5] an issue which is not before the Court, the use of such a flat amount for *all* expenses does not comply with federal requirements. The use of such an arbitrary amount necessarily implies lack of consideration of amounts in excess thereof. *Vialpando v. Shea, supra;*

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[4]The deference normally accorded the statutory interpretation of the federal agency which implements a particular statute (See *e.g., Morningside Lenox Park v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), is not warranted here where the language and legislative history of the statute cannot, in the Court's opinion, be reconciled with the interpretation given by HEW. See *Vialpando v. Shea, supra*, order of March 9, 1972.

[5]See Handbook of Public Assistance Administration, IV - 3140.1; *Vialpando v. Shea, supra.*

Williford v. Laupheimer, supra; cf., Olsen v. Child, ___ F. Supp. ___, 2 CCH Pov. L. Rep. ¶13,201 (D. Idaho, 1970). Accordingly, defendant is hereby enjoined from using the flat work expense allowance of $35 per month as a maximum allowable amount in computing the earned income of employed AFDC applicants and recipients. Defendant shall not be precluded from taking appropriate steps to have the Georgia AFDC Plan modified to comply with federal requirements as set forth in this order nor from using the allowance as a standard deduction subject to right of individual recipients or applicants to show entitlement to a larger allowance. The effect of this injunction is hereby stayed for ten days.

Insofar as individual relief for the named parties herein, it appears that both parties' work expenses exceed the $35 limit. The Court, however, will not attempt to determine what work expenses are "reasonably attributable" to the earning of their income. In light of the ruling that the use of the standard deduction as a maximum allowance contravenes the requirements of the federal statute, plaintiff Adams and intervenor Abrams are entitled to have their earned income recomputed and are entitled to whatever benefits are due to them, by virtue of recomputation, retroactive to December 1, 1971.

The Court has hitherto ruled that this suit could be maintained as a class action on behalf of all AFDC applicants and recipients whose work-related expenses exceed $35 per month, and the plaintiffs have requested relief for the class as follows:

"1. All persons who have been denied full AFDC benefits pursuant to the requirements set forth in 45 C.F.R. §233.20(a) are to be given retroactive assistance back to December 1, 1971.

"2. All persons who applied for AFDC after

December 1, 1971, and were denied because of excess income are to be notified by first class mail by March 1, 1972, that they are entitled to have their applications recomputed according to federal requirements and, if eligible, reinstated as of the month their application was denied; and

"3. All persons whose AFDC grants were terminated on or after December 1, 1971, are to be notified by first class mail by March 1, 1972, that they are entitled to have their eligibility redetermined by federal requirements and, if found eligible, are to be reinstated as of the date of termination."[6]

The defendant has made no argument or suggestion as to the requested class retroactive relief. Aside from the question of whether or not retroactive benefits for the represented class is warranted, such relief undoubtedly would impose a considerable burden upon the State. It would appear that the granting of such relief, in the final analysis, would reduce funds available for AFDC benefits. Accordingly, the Court deems it appropriate that the defendant be given the opportunity to show cause, if any there be, within ten days from the filing of this order, why the class relief requested by the plaintiffs' should not be granted and, alternatively, the defendant's suggestions as to the method of implementing such relief should it be granted. The plaintiffs, of course, within five days of the filing of defendant's brief, may respond to defendant's contentions and suggestions.

SO ORDERED, this 14th day of April, 1972.

Charles A. Move, Jr.
UNITED STATES DISTRICT JUDGE

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[6]Plaintiffs' Supplemental Brief at 20-21.

APPENDIX D

[Filed June 22, 1972]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KATHY CAMPAGNUOLO, on her behalf and on behalf of her minor daughter DAWN MARIE CAMPAGNUOLO, and all others similarly situated	:	
-vs-	:	Civil No. 13,968
HENRY C. WHITE, individually and as Commissioner of Welfare of the State of Connecticut	:	

RULING ON DEFENDANT'S MOTION FOR CLARIFICATION OF INJUNCTION

This case involves the method used by the defendant, Connecticut Commissioner of Welfare, to determine work-related expenses for recipients of welfare in the Connecticut program of Aid to Families with Dependent Children (AFDC). The prior extensive court proceedings will not be reviewed here. See *Campagnuolo v. Harder* (later White), 319 F. Supp. 414 (D. Conn. 1970), *remanded*, 440 F.2d 1225 (2d Cir. 1971); Orders of this court of June 8, June 30 and October 7, 1971. See also, *Connecticut State Welfare Dept. v. Department of Health, Educ. & Welfare*, 448 F.2d 209 (2d Cir. 1971). Jurisdiction is provided by 42 U.S.C. §1983 and 28 U.S.C. §1343(3) on the basis of the plaintiffs' claim of a denial of equal protection; the court is concerned here, however, only with the pendent claim of a violation of

federal statute and regulations of the Department of Health, Education & Welfare (HEW).

The court's Ruling on Motion for Contempt and Other Relief of October 7, 1971, provided that, for purposes of determining eligibility for AFDC assistance and computing the amount of assistance required, the defendant

> "shall exclude from income work expenses reasonably attributable to the earning of income. 45 C.F.R. §233.20(a)(3)(iv)(a). Examples of the work expenses to be included are personal expenses such as income tax deductions, lunches, and transportation to and from work; and expenses of employment which are not personal, such as cost of tools, materials, special uniform or transportation to call on customers. 45 C.F.R. §233.20(a)(6)(iv)."

On October 1, 1971, the defendant implemented a new method of computing work-related expenses as follows:

> "*Expenses of Employment*
>
> "The amount recognized for expenses of employment in all programs is $60 per month when a person works an average of more than 20 hours per week on a monthly basis. If a person works an average of 20 hours or less per week on a monthly basis the amount recognized is $40 per month . . . .
>
> "The expense of employment standard is the amount which is allowed for *all* expenses of employment other than the cost of child care and is to cover personal expenses such as mandatory payroll deductions, lunches, and transportation and non-personal expenses such as the cost of tools, special clothing or uniforms, etc." Connecticut State Welfare Manual Vol. 1 (hereinafter Manual) §332.31.

The defendant seeks a clarification of the injunction which is in force in this case, so as to permit the use of the standard amounts for work-related expenses. The

plaintiffs claim that such a flat amount for work-related expenses is impermissible under federal statute, 42 U.S.C. §602(a)(7), and HEW regulation, 45 C.F.R. §233.20(a)(3)(iv)(a). Title 42 U.S.C. §602(a)(7) requires the state, in determining eligibility and need for welfare assistance, to "take into consideration . . . any expenses reasonably attributable to the earning of . . . income." By regulation, HEW requires the state to "(p)rovide that, in determining the availability of income and resources, the following will not be included as income: (a) Income equal to expenses reasonably attributable to the earning of income . . . ."

Upon the request of the court, HEW submitted a brief as amicus curiae, in which it supports the use of the flat allowance for work expenses. On the basis of *Hosado v. Wyman*, 397 U.S. 397 (1970), the defendant and HEW argue that the state is permitted to consolidate and average work expenses and make a flat allowance therefor and that the $60 and $40 amounts are reasonable.

In interpreting 42 U.S.C. §602(a)(7), the Court of Appeals for the Second Circuit has held that "*all* expenses reasonably attributable to the earning of income . . ." must be excluded from the computation of available income in determining eligibility and need. *Connecticut State Welfare Dept. v. Department of Health, Educ. & Welfare, supra*, 448 F.2d at 216 (emphasis added). The court there approved *Williford v. Laupheimer*, 311 F. Supp. 720 (E.D. Pa. 1969), where a three-judge district court ruled that §602(a)(7) prohibited the imposition by Pennsylvania of a maximum deduction for work-related expenses.

More recent cases have been decided similarly. In *Vialpando v. Shea*, Civ. No. C-2449, Memorandum Opinion (D. Colo. Mar. 9, 1972), the court held that Colorado's flat allowance for work expenses violated §602(a)(7). The court stated:

> "If the question before us were whether a flat grant system would simplify and streamline the AFDC program, then we might well be persuaded that it would. Were we deciding the wisdom of creating a 'consumption incentive' by not rewarding welfare recipients who cut down on their work-related expenses, our conclusion might be that this was not a wise policy. But these are not the questions before this court; we are asked to interpret §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7) . . . .
>
> "We would show deference to HEW's factual conclusions that a flat grant may be a more efficient way to deal with work expenses, but we cannot agree with its legal conclusion that §402(a)(7) allows this." *Id.* at 2-3.

And in *Adams v. Parham*, Civ. No. 16,041, Memorandum of Decision at 4 (N.D. Ga. Apr. 14, 1972), the court held that

> "the Court cannot reconcile use of the standard deduction for work-related expenses with the legislative history and language of Section 402(a)(7) of the Social Security Act and regulations promulgated pursuant thereto."

The instant case is indistinguishable from these cases. See also, *Conover v. Hall*, No. 215,815 (Dept. 9, Superior Ct., Sacramento, Calif., Oct. 8, 1971).

The court holds that §602(a)(7) prohibits the defendant from imposing a limit on the amount of work-related expenses by the use of a flat allowance. Accordingly, the defendant is hereby enjoined from using the flat work expense allowance of $60 and $40 per month, Manual §332.31, as a maximum allowable amount in computing the earned income of employed AFDC recipients and applicants. The defendant is not precluded from using the flat allowances as standard deductions subject to the right

of individual recipients or applicants to show entitlement to larger allowances. This was the holding in *Adams v. Parham, supra.*

The defendant has moved for the designation of additional class representatives on the ground that the earnings of the named plaintiff are so high as to make her unrepresentative of the class of AFDC working recipients. In view of the holding above, the motion is denied. The ability of the named plaintiff to prove work-related expenses in excess of $60 per month does not prejudice other AFDC recipients with lower expenses, since the court does not hold that a standard allowance for work-related expenses is violative of the federal statute; the court merely holds that such a standard allowance may not be used to create a maximum, beyond which the recipient's expenses may not be allowed. Used as a standard allowance simply, and not as a maximum, the amounts of $60 and $40 per month are found by the court to be reasonable, on the basis of the expert opinion of HEW.

The case of the named plaintiff, however, illustrates what seems to the court a curious effect of the income-disregard provisions of the AFDC program. See 42 U.S.C. §602(a)(8). Katherine Campagnuolo is employed as a legal secretary at a salary of $520 per month. The total needs of her family, which consists of herself and one child, have been determined by the defendant to be $262.03 per month. Her eligibility for AFDC benefits is determined under Manual §332.32 (A)(1), which provides:

> "If AFDC has been received for any *one* of the *four* preceeding (sic) months:
>
> * * * * *
>
> "c. Disregard $30 of the total earned income of other family members (than students), plus 1/3 of the remainder of their income.

"d. From the balance of earned income after completing steps a. through c. deduct the appropriate employment expense standard for all family members employed other than students referred to in a. & b. above.

"e. If available income from all sources is less than need, the family is eligible for assistance."[1]

The named plaintiff has submitted an affidavit in which she claims work-related expenses of $209.34 per month.[2] Assuming these expenses are allowed,[3] the computation of her eligibility and need is as follows:

(1) $520.00
-30.00
$490.00

(2) $\frac{\$490.00}{3} = \$163.33$

(3) $490.00
-163.33
$326.67

(4) $326.67
-209.34
$117.33

(5) $262.08 (need)
-117.33 (available income)
$144.75 (award)

---

[1]If AFDC benefits have not been received within the last four months, eligibility is determined simply by subtracting work-related expenses from gross income, and if the result is less than budgeted need, the applicant is eligible for assistance. Manual §332.32(A)(2). The income disregard provisions are applied, however, in determining the amount of the AFDC award.

[2]These expenses are: federal withholding tax, $63.30; Social Security tax, $23.04; transportation to and from work, $43.00; lunches, $40.00; clothing necessary to employment, $20.00; personal items necessary to employment, $15.00.

[3]The court does not pass upon whether the named plaintiff is entitled to have all these expenses allowed, in the amount claimed by her.

Thus, the plaintiff has a total gross income each month of her salary of $520 plus her AFDC award of $144.75, or a total of $664.75, assuming that her employment expenses are allowed. She and her child are also eligible for Title XIX medical assistance, which is in her case quite substantial, according to the testimony of this case.

Assuming constant work-related expenses, the named plaintiff would have to receive a salary of about $740 per month to become ineligible for AFDC payments.[4] If her salary were $730 per month, she would still be eligible for AFDC and Title XIX benefits, assuming that employment expenses of $209.34 remained constant and were allowed. At that level the incentive to go to work is certainly present. At the same time, it is easy to see that the income disregard provisions of the AFDC program would discourage her from accepting any salary increment which would make her ineligible for welfare. How to solve the underlying problem of removing from the welfare roles those who could earn income sufficient to terminate eligibility is for Congress to decide. But imposition by the defendant of an arbitrary limit of $60 for work-related expenses to accomplish that result in this case is not permissible.

The defendant's motion for clarification of the injunction in this case to allow exercise of Manual §332.31 is granted to the extent that the amounts specified therein may be used as standard deductions for work-related expenses, and denied to the extent that applicants and

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[4](1) $\$740.00 - \$30.00 - \frac{\$710.00}{3} = \$236.66$ (exempt income under work-incentive regulations)

(2) $\$710.00 - \$236.66 - \$473.34 - \$209.34 = \$264.00$, which exceeds her budgeted need for $262.08 by $1.92.

recipients are prohibited from showing work-related expenses in excess of the standard amounts. The defendant's motion for the designation of additional class representatives is denied.

Since the defendant's flat allowances for work-related expenses were put into effect on October 1, 1971, there is a substantial possibility that since that date working AFDC recipients had their awards reduced or were found ineligible[5] for continued assistance and that applicants for AFDC assistance were denied eligibility because of the defendant's limitation on work-related expenses. The defendant is thus ordered to notify these classes of persons that they may have their assistance payments recomputed or their eligibility redetermined, with retroactive benefits to be paid accordingly.

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of June, 1972.

M. Joseph Blumenfeld
Chief Judge

[5]The application of the $60 limitation on work expenses resulted in the named plaintiff's being notified that she was no longer eligible for AFDC assistance. On April 11, 1972, this court enjoined the defendant from terminating AFDC and Title XIX assistance to her pending the decision in this case; but this injunction ran only in favor of the named plaintiff.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1441 & 73-1466

Fred Anderson, for himself and his minor children; Janice Anderson, Jeannette Anderson and Fred Anderson, Jr., on behalf of themselves and all others similarly situated, Appellants, v. Lawrence L. Graham, Director of Public Welfare, individually and in his official capacity, Appellee.	*	Appeal from the United States District Court for the District of Nebraska

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Submitted: November 15, 1973.
Filed: December 20, 1973.

Before VAN OOSTERHOUT and MOORE*, Senior Circuit Judges, and WEBSTER, Circuit Judge.

VAN OOSTERHOUT, Senior Circuit Judge.

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*LEONARD P. MOORE, Senior Circuit Judge, Second Circuit, sitting by designation.

This action is brought by plaintiff Fred Anderson, a Nebraska Aid for Dependent Children (AFDC) recipient for himself, his minor children, and all others similarly situated, against Lawrence L. Graham, Nebraska Director of Public Welfare, individually and in his official capacity. Plaintiff's attack is directed at the Nebraska $25.00 standard business expense allowance for employed AFDC recipients who have incurred employment-related expenses exceeding $25.00. Jurisdiction is based on 42 U.S.C. §1983.

Plaintiff seeks to enjoin the application of the Nebraska standard business expense allowance as being in violation of 42 U.S.C. §602(a)(7) and the regulations promulgated thereunder. Plaintiff also seeks retroactive payment of AFDC benefits based upon a consideration of all reasonable work-related expenses actually incurred.

The Nebraska plan determines net income by the following method:

A. Determine gross earned income;
B. Subtract $30.00, plus one-third of the remainder as work incentive disregard, pursuant to 42 U.S.C. §602(a)(8);
C. Subtract state income tax, federal income tax, and social security tax withholding;
D. Subtract actual necessary child care costs;
E. Subtract a work expense standard of $25.00 per employed person.

The result of this computation is the net income of the welfare recipient used to determine eligibility and the amount of AFDC payments due if any. The only item included in the foregoing computation in dispute is item "E", the standard work expense allowance of $25.00 given to each employed recipient. The deduction is standard throughout the State of Nebraska and includes the following categories:

1. Transportation to and from work and to and from a child care center or baby sitter;

2. union dues;
3. employee's fund, retirement, insurance, pensions, charity;
4. extra or special clothing, uniforms;
5. cost of materials, cosmetic supplies booth rental;
6. cost of tools and equipment;
7. overhead business expenses;
8. licenses;
9. required contributions for employees benefits; and
10. special lunches while workin

This case was tried before Judge Urbom on motions for summary judgment filed by both parties. The record consists of pleadings, defendant's answer to plaintiff's request for admission of facts, plaintiff's answer to interrogatories, and pretrial conference. Both parties state that there is no dispute as to material facts.

At a pretrial conference on November 24, 1972, counsel stipulated that the work-related expenses of the plaintiff Fred Anderson exceed $25.00 per month. Counsel agreed that the sole issue on the plaintiff's motion for a summary judgment is whether a state may standardize work-related expense in determining the amount of net income of employed AFDC recipients, without regard to the validity or the invalidity of any studies made by the state in formulating the standard.[1]

Anderson, an AFDC recipient, was employed at the Offutt Air Force Base. Prior to 1972 Anderson was receiving AFDC payments based upon his family's budgetary need. Anderson was a widower. His family consisted of four minor children, one of whom became

[1] It was also understood at the pretrial conference that if plaintiff's motion for summary judgment is overruled, an evidentiary hearing would be held upon the validity of the method by which the State determined the amount of the standard deduction.

eighteen years of age in 1972 and left home and became self-sustaining. On February 24, 1972, it was determined that the budgetary need no longer exceeded Anderson's income. Such determination was brought about by limiting Anderson's deductible work expense deduction to the standard $25.00 allowance. While some of Anderson's work-related expense items may be in dispute, defendant admits work-related expenses exceeded $25.00. It is undisputed that the following monthly work-related expenses were paid through payroll deductions:

Retirement	–	$40.41
Union Dues	–	5.42
Health and Disability Benefits	–	39.04
Life Insurance	–	5.95

In addition, Anderson testified by deposition that he drives a distance of 350 to 400 miles per month to and from his work station and that the reasonable expense for such travel is ten cents per mile, and that he incurs expenses for uniforms and food purchases while at work. These categories are recognized as work expenses by HEW as specified in Handbook of Public Assistance Administration, §3410.

Anderson in his deposition taken on December 22, 1972, testified that he employed his sister-in-law, Ruth B. Delsee, to care for his minor children at a cost of $100.00 per month. After defendant produced a certified copy of certificate showing marriage of Anderson and Ruth B. Delsee on the 26th of August, 1972, plaintiff filed a response admitting such marriage and further conceded that as a result of such change in circumstances, he became ineligible for future AFDC payments. Anderson states that he intends to proceed with this action for declaratory relief and retroactive benefits for himself and on behalf of the class he represents.

On December 13, 1972, Shirley Von Dorn filed motion to intervene as party plaintiff, stating that she was a member of the class represented by Anderson. Such leave was granted by the trial court. Mrs. Von Dorn was an AFDC recipient who incurred work-related expenses exceeding $25.00 per month. The court permitted the action to proceed as a class action. No attack has been made upon such ruling.

A final judgment was filed on June 12, 1973, adjudicating as follows:

> 1. The standard $25.00 per month allowance for expenses reasonably attributable to the earning of income for welfare recipients, as set forth in the Plan and Manual of the Nebraska Department of Public Welfare, violates §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7), insofar as the standard does not take into consideration all expenses reasonably attributable to the earning of income for those welfare recipients who may have expenses in excess of the $25.00 per month standard, and is declared void pursuant to 28 U.S.C. §2201 and Rule 47 of the Federal Rules of Civil Procedure.
>
> 2. The defendant, Lawrence L. Graham, individually and in his official capacity, his officers, employees, agents and successors in office are restrained from failing to consider, in accordance with §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7), any and all expenses reasonably attributable to the earning of income in establishing financial eligibility and the amount of assistance payments of employed applicants and recipients of Aid to Families with Dependent Children (AFDC). Under this order, the defendant, his officers, employees, agents and successors in office are restrained from failing to consider, by reason of the

$25.00 per month standard work-expense allowance, as contained in the Nebraska State Plan and Manual, any and all expenses reasonably attributable to the earning of income which are in excess of said $25.00 per month standard allowance or in any other way limiting the consideration of expenses reasonably attributable to the earning of income. Nothing herein shall preclude the defendant, his officers, employees, agents and successors, from using a $25.00 per month work-expense allowance as a standard deduction for work-related expenses (covering all such expenses, except child care, income tax withholding, and Social Security tax withholding, which expenses shall be considered separately), provided that employed AFDC applicants and recipients are informed of their right to have considered any and all expenses reasonably attributable to the earning of income which are in excess of the $25.00 per month standard allowance.

3. This judgment confers no right on the plaintiffs to retroactive payments.

A well-reasoned memorandum opinion was filed by Judge Urbom setting out the facts, the issues and the basis of decision.

Plaintiff has taken a timely appeal from paragraph "3" of the judgment which determines plaintiffs have no right to retroactive payment of AFDC payments wrongfully withheld. Defendant has cross-appealed from paragraphs "1" and "2" of the judgment invalidating the standard $25.00 work expense allowance with respect to welfare recipients who can establish work-related expenses in excess of $25.00 per month, and the portion of the judgment restraining the defendant from refusing to consider all expenses reasonably attributable to the earning of income and determining eligibility and amount of assistance payments due employed applicants for AFDC payments.

We affirm on plaintiff's appeal and on defendant's cross-appeal for reasons hereinafter set out. The cross-appeal will be considered first as the retroactive issue only arises if we affirm on the cross-appeal.

Defendant's Cross-Appeal.

Plaintiff's contention, upheld by the trial court, is that defendant's action in limiting business expenses related to earnings to $25.00 in situations where such expense exceeds $25.00[2] is a violation of 42 U.S.C. §602(a)(7) which provides that states which participate in the AFDC program must have a plan which takes into consideration in determining a need the income of any child or relative claiming aid "as well as any expenses attributable to the earning of such income."

The judicial construction of §602(a)(7) properly begins by looking at the text of the statute itself. *United States v. Bass*, 404 U.S. 336, 339 (1971). As stated by the Second Circuit in *Connecticut State Department of Public Welfare v. Department of Health, Education, and Welfare*, 448 F.2d 209, 216 (2d Cir. 1971), the statute

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[2]We reiterate, as did the trial court, that the attack on the Nebraska standard earning expense allowance is limited to situations where AFDC applicants or recipients claim and prove expense attributable to earned income in excess of the $25.00 standard deduction. In many cases the standard deduction will be greater than actual work expense. Work expense incurred in earning income will necessarily vary greatly. One who has to travel a substantial distance to the scene of his employment will ordinarily incur far more expense for transportation than one whose work station is within a few blocks of his home. One who must supply his own tools or provide a uniform will incur business-related expense not incurred by persons who do not have to provide such items.

clearly provides that all expense reasonably attributable to the earning of income must be excluded from the computation of available income in determining eligibility and need. Additionally the legislative history of the enactment of §602(a)(7) fully supports the trial court's interpretation of the statute.[3]

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[3]In 1962 President Kennedy proposed changes in the public assistance program which stressed "service instead of support, rehabilitation instead of relief, and training for useful work instead of dependency." Hearings on H.R. 120032 before the House Ways and Means Committee, 87 Cong., 2d Sess. (February 1962), p. 2.

Secretary Ribicoff in a letter to the Speaker of the House stated, "To encourage assistance recipients to participate in the community work and training programs or take regular employment, full consideration of the additional expenses of employment would be required." *Id.* at p. 2.

He further states:

> Under current Federal policy, while States are required to consider any income and resources (with certain exclusions in the case of Title X of the Social Security Act) in determining need, they are encouraged but not required to take into consideration expenses incurred in earning income. All public assistance titles of the act would be changed by the bill to require the consideration of necessary expenses that may reasonably be attributed to earning income. These changes would not become effective until July 1, 1962. [*Id.* at p. 28.]

In the hearings before the Senate Finance Committee, Secretary Ribicoff in response to a question from Senator Curtis stated:

> * * * What we are trying to do, Senator Curtis, is do everything we can to encourage people to get a job and work and we feel it is important to encourage the States. By having this provision, the State will take into account these expenses so people will get jobs. I believe that the State should give them an allowance for those items that are necessary for them to get a job.

Hearings before the Committee on Finance, U.S. Senate, 87th Cong., 2d Sess. (May 1962) p. 152.

The Senate Report on the bill which includes §602(a)(7) subsequently enacted explains the purpose of the mandatory work expense disregard law as follows:

Chief Judge Lewis of the Tenth Circuit in *Vialpando v. Shea*, 475 F.2d 731, 735 (10th Cir. 1973), in a well-reasoned opinion supported by persuasive authority, faces the same issue presently before us and thus interprets §602(a)(7):

> A state must compare its standard of need to the income and resources actually available to the particular family in order to establish financial eligibility and the amount of an AFDC grant. 45 C.F.R. §233.20(a)(3)(ii)(*a*) and (*c*). 43 U.S.C. 602(a)(7) requires that the computation of income and resources available to the particular family must take into consideration any expenses reasonably attributable to the earning of income. To uniformly apply a standardized employment expense allowance rather than consider actual expenses in this

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Under the present law, all income of recipients of public assistance is taken into account (with a limited exception under Title X) in determining need. States are permitted, but not required, to take into consideration the expenses an individual has in earning any income (this practice is not uniform in the country and in a substantial number of States full consideration of such expenses is not given). The Committee believes that it is only reasonable for the States to take these expenses fully into account. Under existing law if these work expenses are not considered in determining need, they have the effect of providing disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter. The bill has, therefore, an added provision in all assistance titles requiring the State to give consideration to any expense reasonably attributable to the earning of income. [Senate Report No. 1589, 87th Cong., 2d Sess. U.S.C.C.A.N. 1943, 1959-1960.]

The House Report, H.R. No. 1414, 87th Cong., 2d Sess., 23 (1962), contains in essence the same language.

computation would render meaningless the process of comparing a particular family's available income and resources with a hypothetical family's standard of need.

The problem with the Colorado system is not its use of a standardized allowance but the intransigent adherence to this standard when a particular family's expenses of employment exceed the allowance. In such cases, Colorado's standard allowance operates as a maximum allowance which we also consider to be inconsistent with 42 U.S.C. §602(a)(7). Williford v. Laupheimer, E.D. Pa., 311 F. Supp. 720 (three-judge court). Nevertheless, a reasonable interpretation of the statute permits "a state to use a standard deduction for [employment] expenses in the interest of efficient administration of the [AFDC] program, *provided the allowance is adequate to cover all actual expenses.*"

We fully agree with such interpretation.[4]

Judge Lewis in *Vialpando* for valid reasons there stated has properly rejected all contentions here made on the work expense issue.

We agree with the trial court's determination that §602(a)(7) requires the State of Nebraska to deduct all reasonable work-related expenses in all instances where

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[4]We note that the Supreme Court granted certiorari November 5, 1973, No. 72-1513, *Shea v. Vialpando*, 42 L.W. 3270. Considerable time may elapse before the Supreme Court reaches the case for decision. The trial court has granted a stay during the pendency of this appeal. We hold in the next division that plaintiff and members of the class are not entitled to retroactive payment against the State in a federal suit. We believe that under all the circumstances here raised, the parties are entitled to a prompt decision in this court. See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Like v. Carter*, 448 F.2d 798, 804 (8th Cir. 1971).

such expenses exceed the standard $25.00 deduction in determining the amount of net income available to AFDC recipients, and we affirm the trial court on such issue.

Retroactive Payment.

Judge Urbom denied retroactive payment of deficiencies in AFDC payments brought about by the State's failure to consider work-related expenses in determining eligibility and amount of AFDC benefits. He reached this result on the basis of *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972). All aspects of the retroactive payment issue are there fully considered and such payments are denied on the basis of persuasive authorities cited and discussed. In *Rothstein*, as here, the action was brought against the head of the State social welfare department. *Rothstein*, in Division III at p. 236 of 467 F.2d, determined that retroactive payments constituted a claim against the State and that such payments were thus barred by the Eleventh Amendment. We agree.

In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 452 F.2d 820 (8th Cir. 1971), state hospital and training school employees brought an action against the Welfare Department to recover overtime compensation due under the Fair Labor Standards Act. We held that *Maryland v. Wirtz*, 392 U.S. 183 (1968), determined that the employees were entitled to the overtime pay they were demanding but that federal courts by reason of the Eleventh Amendment lacked jurisdiction to grant relief. We discussed at length the history, purpose and scope of the Eleventh Amendment. We also determined that the State by continuing to operate its institutions did not waive its Eleventh Amendment immunity to federal suit. The Supreme Court affirmed. *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973). The

Court held that the Fair Labor Standards Act made no express provision for depriving the states of their Eleventh Amendment immunity and held that the State by continuing to operate its institutions did not waive its Eleventh Amendment rights.

The holding in *Employees* fully applies to the instant case. As observed in *Rothstein, supra,* p. 238 of 467 F.2d:

> Congress has not explicitly conditioned the grant of such funds upon the willingness of the recipient state to waive the immunity from suit provided by the Eleventh Amendment; nor are retroactive payments so necessary to the effectuation of congressional policies that a waiver arises by implication.

In *Like v. Carter,* ___ F.2d ___ (8th Cir., Nov. 1, 1973), we held:

> We agree with the district court's view that on jurisdictional grounds, the Eleventh Amendment bars any award for lost welfare benefits because of the failure of the state to pay claims within the prescribed time period of 30 days.

We are aware of *Jordan v. Weaver,* 472 F.2d 985 (7th Cir.), *cert. denied sub. nom. Edelman v. Jordan,* 412 U.S. 937 (1973), which supports plaintiff's position on the retroactive issue. That case was decided prior to the decision of the Supreme Court in *Employees v. Missouri Public Welfare Department, supra,* and is inconsistent with that decision on the Eleventh Amendment issue. The result reached in *Jordan* is also contrary to that reached by this Court in the cases heretofore cited.

We hold that plaintiff's suit for retroactive benefits is in effect a suit against the State, that the State has not waived its immunity, and hence the Eleventh Amendment deprives the federal court of jurisdiction to award a

money judgment against the State for the retroactive payments here claimed.

As noted by the Supreme Court majority opinion in *Employees*, we are here concerned only with the constitutional restraints of the judicial power of the United States courts under the Eleventh Amendment and not with the issue of whether plaintiff could recover in a state court, see concurring opinion, p. 298 of 411 U.S., or in a suit by the federal government. Thus the judgment for dismissal of the claim for retroactive benefits will be modified to show that it is based upon lack of jurisdiction by reason of the Eleventh Amendment and as so modified, the judgment of dismissal will be affirmed.

The order of the trial court staying the injunction and all proceedings to enforce its judgment pending appeal is terminated.

Modified and affirmed on plaintiff's appeal. Affirmed on defendant's cross-appeal.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATION

Aug. 13, 1970

Mr. Henry A. Freedman
Senior Attorney
Center on Social Welfare Policy and Law
401 West 117th Street
New York, New York 10027

Dear Mr. Freedman:

Your letter of July 2, 1970, has been received in which you have commented on the regulations which represent codification of rules contained in the Handbook of Public Assistance.

As you have noted in your letter, there was no intention of making basic changes in the policies previously in effect. Only the specific provisions contained in the requirements for State plans were used.

It is intended that other materials now contained in the Handbook of Public Assistance will be issued subsequently as interpretive guides. Consideration will be given, however, to incorporating in the final regulation certain statements previously contained in the criteria or interpretation sections of the Handbook.

We appreciate your review of this material and assure you that your suggestions with regard to the various policy

subjects cited will be given careful review prior to issuance of the final regulation.

Thank you for your review of the proposed regulation and for your various comments.

Sincerely yours,

/s/ John D. Twiname
John D. Twiname
Administrator

APPENDIX G

COLO. DIVSN. PUB. WELFARE STAFF MANUAL - VOL. IV PUBLIC ASSISTANCE FORMS PART C FORMS USED IN OTHER PUBLIC ASSISTANCE PROGRAMS	C-4421.2 – C-4421.23
FOOD STAMP PROGRAM APPLICATION, ELIGIBILITY AND AUTHORIZATION	Effective: May, 1971 T.L. # 1129 Supersedes: T.L. #1120

C-4421.2 FORM FS-2, "CERTIFICATION WORK SHEET – PA HOUSEHOLDS."

This form is used to record the net income available for the purpose of determining the amount of the purchase requirement and bonus. The form is also used to determine the appropriate period of certification or recertification. For further details see Vol. IV, 4612.321. The form is attached to the case file copy of the Form FS-4, "Notice of Action" for the period of certification covered.

The caseworker or eligibility technician completes one copy of the form. The form is designed so that the first part, concerning household identification, can be completed at the same time as the Form FS-4, by using a carbon and overlay it with the Form FS-4. Separation should then be made to complete the balance of each form. The spaces and blocks of the household information section provide general information pertinent to the certification status of the household. Note: The household composition must be the same as that reflected on the RS700 to use this form, i.e. all members of the household must be receiving public assistance.

This form must be completed on each certification and recertification of a public assistance household and is made a permanent part of the case record. Supplies of this form are to be obtained from the printer.

C-4421.21 PA INCOME.

Enter the amount of assistance grant (money payment) available to the household, the category and effective date of the RS700.

Enter the monthly amount of take-home pay from employment, and show the source and verification of the amount.

Enter the monthly amount of income received from any other source, and show the source and how verified.

C-4421.22 DEDUCTIONS FROM PA INCOME.

All deductions are to show the average monthly amount and how it was verified that the amount was paid out.

Documentation substantiating the need for hardship deductions are entered on the reverse side of the form. These deductions must be approved by the county director or supervisor (Vol. IV, 4612.631).

C-4421.23 PURCHASE REQUIREMENTS AND BONUS.

The total net income is the amount used in determining the purchase requirement and bonus of the household. (See Vol. IV, 4612.631 and 4212.9)

APPENDIX H

FS-2 (12-70)
OUT WEST COLO 8088

El Paso DEPARTMENT OF WELFARE
FOOD STAMP PROGRAM

FOOD STAMP WORKSHEET – PUBLIC ASSISTANCE HOUSEHOLDS

PLACE OF PURCHASE

PA ☑ NON PA ☐ CONS ☐

NAME (HEAD OF HOUSEHOLD FIRST-MIDDLE-LAST): Delpardo, Ascension

NO. IN HH.: 3

HH. NO.: 038100 02

COOKING FACILITIES: YES ☑ NO ☐

ADDRESS: 320E Dove

ZIP CODE

SOC. SEC. NO: —

TELEPHONE NO.: —

AUTHORIZED REPRESENTATIVE OR PROXY: —

APP. IS: APPROVED ☐ DENIED ☐

APP. STATUS: NEW ☐ RECERT ☑ REINSTATE ☐ REOPEN ☐ H.H. HEAD CHANGE ☐ TRANSFER IN ☐

RACIAL/ETHNIC GROUP CODE (VOL. IX SEC. 9122.284):

PA INCOME, VOL. IV SECT. 4612.63	AMOUNT	VERIFICATION, COMMENTS, REMARKS
1. AMOUNT OF PA GRANT	$ 101 53	ADC (Reimbursed 92.47)
2. MONTHLY INCOME FROM EMPLOYMENT	$ 232.07	IJ Consr
3. MONTHLY INCOME FROM ANY OTHER SOURCE (OASDI, ETC.)	$	
4. TOTAL PA INCOME (ADD LINES 1 THRU 3)	$ 333 60	
DEDUCTIONS FROM PA INCOME		
5. ACTUAL HOUSING COST, ACTUAL UTILITIES AVERAGED (OR ADC AUTHORIZED UTILITIES)	101 67 ~~$ 97 67~~	$85 00 Rent 12 67 Utl 97 67 + 4 00 Heat 101 67
6. 30% OF LINE 4	$ 100 08	
7. EXCESS SHELTER COSTS. IF LINE 5 IS LARGER THAN LINE 6, SUBTRACT LINE 6 FROM LINE 5. IF LINE 5 IS LESS THAN LINE 6, NO AMOUNT SHOULD BE ENTERED	$ 1.79	
8. COST OF NECESSARY CHILD CARE OR HOUSEKEEPING SERVICES	$ —	
9. VERIFIED PAYMENTS FOR MEDICAL OR DENTAL CARE, MEDICINE, PROSTHETIC DEVICES, ETC. NOT BEING PAID BY THE COUNTY	$ —	
10. APPROVED DEDUCTIONS FROM FUNDS RECEIVED (INCOME) FROM OEO PROGRAMS, ELEM. AND SEC. EDUC. PROGRAMS, AND GOV'T SPONSORED TRAINING PROGRAMS	$ —	
11. HARDSHIP DEDUCTIONS (APPROVED BY COUNTY DIRECTOR OR SUPERVISOR)	$ —	
12. EXCESS TRANSPORTATION COSTS RELATED TO EMPLOYMENT	$ 19.40	$0 weekly mileage 43 240 320 34 40 - 15 00 19 40
13. OTHER APPROVED DEDUCTIONS (EXPLAIN IN REMARKS COLUMN)	$ 12 00	uniform
14. TOTAL DEDUCTIONS FROM PA INCOME (ADD LINES 7 THRU 13)	$ 33 19	
15. PA INCOME CONSIDERED FOR FOOD STAMPS (SUBTRACT LINE 14 FROM LINE 4)	$ 300 41	
PURCHASE REQUIREMENTS AND BONUS, VOL. IV SECTION 4612.9		
16. TOTAL INCOME AVAILABLE TO HOUSEHOLD (LINE 15)	$ 300 41	
17. FOOD STAMPS PURCHASE PRICE (CASH REQUIREMENT)	$ 66 00	
18. BONUS FOOD STAMPS	$ 18 00	
19. TOTAL FOOD STAMPS	$ 84 00	

PERIOD OF CERTIFICATION, VOL. IV SECT. 4612.51 FROM THRU

TECHNICIAN'S NAME: T Mabry

POSITION NO.: 19 0 11

DATE OF DETERMINATION: 10 01 71

PURCHASE PLAN: ☑ MO. ☐ SEMI MO. ☐ WEEKLY